Supreme Court, U.S.
FILED
MAR 21 1996
OFFICE OF THE CLERK

No. 96-5151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH GERASOLO, ELIZABETH GERASOLO, and PATRICK BLEACH,

Petitioners,

—v.—

THE ADHERENCE GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TOMPKINS, MCGUIRE & WACHENFELD
100 Mulberry Street
Gateway Four
Newark, NJ 07102
(201) 622-3000

CONNELL LOSQUADRO & ZERBO
17 State Street
New York, NY 10004
(212) 344-7400

Raymond A. Connell,
Of Counsel

62 pp

QUESTION PRESENTED

Whether under the Federal Interpleader Act, which provides "[t]he district courts shall have original jurisdiction of any civil action of interpleader" (28 U.S.C. § 1335), and requires such district courts "shall hear and determine the case" (28 U.S.C. § 2361), the discretionary standard of *Brillhart*[1] or the "exceptional circumstances" standard established by *Colorado River*[2], and *Moses H. Cone*[3] governs the decision of a United States District Court having custody of the interpleaded fund, to abstain from exercise of federal subject matter jurisdiction in deference to a subsequently commenced state court proceeding?

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1 *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

2 *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1974).

3 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

LIST OF PARTIES

The names of all parties to this petition and to proceedings below are contained in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 21, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is not officially reported; it is reproduced in the Appendix at A1a. The relevant order of the United States District Court for

the District of New Jersey is not officially reported; it is reproduced in the Appendix at A28a.

STATEMENT OF JURISDICTION

On December 21, 1995 judgment of the United States Court of Appeals for the Third Circuit was entered.

On February 2, 1996 petitions for *in banc* review by the United States Court of Appeals for the Third Circuit were denied. A32a, 33a.

Jurisdiction to review by writ of certiorari the judgment in question is conferred by 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The applicable statute is the Federal Interpleader Act, 28 U.S.C. §§ 1335 and 2361; it is reproduced in the Appendix at A34a, 35a.

STATEMENT OF THE CASE

A. Nature of the Case.

The basis for federal subject matter jurisdiction in the district court was the Federal Interpleader Act, 28 U.S.C. § 1335.

Petitioner Joseph Gerasolo, a citizen of the State of New York, was employed by respondent The Adherence Group, Inc. ("TAG") from 1977 to his dismissal in October, 1993; from 1985 until dismissal, he was president and a director of TAG.

Petitioner Elizabeth Gerasolo is Joseph's wife. She is a citizen of the State of New York. Elizabeth was never an employee of TAG.

Petitioner Patrick Bleach, a citizen of the State of New Jersey, was employed by TAG from 1977 to October, 1993; from 1990 to termination of his employment, Bleach was executive vice president and a director of TAG.

Respondent TAG is a corporation organized under the laws of Delaware with its office and principal place of business at 669 River Drive in the Borough of Elmwood Park, County of Bergen, State of New Jersey.

In June 1991, TAG established a non-qualified executive compensation plan pursuant to which Joseph Gerasolo, Bleach and other executives opened accounts with Mainstay, Inc. through NYLife Distributors, Inc. ("NYLife"). During the period from June, 1991 to termination of their employment in October, 1993, TAG deposited funds into the Mainstay accounts of each of these officers.

There were two categories of Gerasolo Accounts at Mainstay:

(1) The 1989 Accounts opened jointly by Joseph and Elizabeth Gerasolo through NYLife, into which contributions from personal savings were made from January, 1989 to July, 1991. After July, 1991 the accounts remained open accumulating interest and dividends; and,

(2) The 1991 Accounts opened individually by Joseph Gerasolo through NYLife for the purpose of receiving non-qualified executive compensation paid by TAG as part of his compensation package.

The Bleach Accounts were opened with Mainstay in June 1991 for the purpose of receiving Bleach's non-qualified executive compensation paid by TAG as part of his compensation package.

In October, 1993 employment of Gerasolo and Bleach at TAG was terminated. The termination procedure included execution of separate Settlement Agreements. By each Agree-

ment TAG undertook to indemnify and hold harmless Gerasolo and Bleach in connection with any claim, and to release them from liability, "arising out of any activity occurring during the term of their employment." TAG also undertook to pay "[a]ll expenses, legal and otherwise, associated with all claims concerning the [TAG] Group. . . . asserted after termination resulting in [Gerasolo or Bleach] being named a party . . . " Appellants' Appendix in Third Circuit, pp. 77 and 97.

B. Disposition Below.

1. Proceedings in the District Court.

On February 15, 1994 NYLife, reacting to claim made by TAG against Mainstay accounts of executives, including former officers Gerasolo and Bleach, invoked the protection of the Federal Interpleader Act, 28 U.S.C. § 1335, by filing an Interpleader Complaint in the United States District Court for the District of New Jersey. The Gerasolos, Bleach, and TAG were among defendants named and served in the interpleader action.

NYLife liquidated all Mainstay accounts opened in 1991 by Gerasolo, Bleach, and other TAG officers, and into which TAG was making deposits, along with Mainstay accounts opened jointly by Joseph and Elizabeth Gerasolo in 1989. Cash derived from these liquidations totalled $215,489.50, which was deposited in the district court registry to satisfy the requirement of 28 U.S.C. § 1335(a)(2).

The district court directed all defendants to show cause why they should not be required to interplead and settle among themselves right to the interpleaded fund, and why NYLife should not be dismissed from suit. All defendants were enjoined from instituting or prosecuting claim in any other court, state or federal, against the interpleaded fund.

In response to the Order to Show Cause entered in connection with the interpleader action, the Gerasolos and Bleach filed a cross-motion for an order, *inter alia*, dismissing the action against them, and reinstating their accounts at Mainstay. Joseph Gerasolo and Bleach made claim against TAG for costs and expenses, including attorneys' fees, incurred as a consequence of TAG's breach of Settlement Agreement release and indemnity provisions.

TAG responded to the cross-motion by contending remittances into Mainstay accounts had not been authorized by TAG's board of directors, or by its Swiss parent, and the Settlement Agreements were voidable for fraud.

On March 23, 1994 TAG filed complaint in Superior Court of New Jersey, Middlesex County, against the Gerasolos, Bleach and others. Among other things, by this state court action TAG made claim to funds which were the subject of the federal interpleader action.

On May 19, 1994 the district court granted NYLife's request for interpleader relief. The interpleaded fund of $215,489.50 was to remain on deposit in the district court registry, and NYLife was dismissed from the action. Decision on the cross-motion of Gerasolo and Bleach for attorneys' fees and costs would abide determination of the merits of the underlying dispute between TAG and its former officers. The district court allowed TAG to continue its state court action.

On July 8, 1994 TAG filed motion for an order: (1) dismissing cross-claims for want of federal subject matter jurisdiction (2) transferring the interpleaded funds from the registry of the district court to the registry of the state court in which TAG had commenced its action against the Gerasolos, Bleach and others, (3) alternatively, staying further proceedings in the federal interpleader action so the New Jersey state court could decide how the district court should distribute the interpleaded fund.

On its motion, TAG made no reference to federal abstention, or its requirements.

In opposition to the TAG motion, the Gerasolos and Bleach maintained, *inter alia*, the district court must exercise its federal subject matter jurisdiction mandated by Congress under the Federal Interpleader Act, 28 U.S.C. § 1335, unless TAG could demonstrate the case falls within the "exceptional circumstance" ground for federal abstention established by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

By Order dated October 26, 1994 the district court, acting in the belief its May 19 Order granting NYLife § 1335 interpleader relief had marked the end of federal interpleader proceedings, declined exercise of § 1367(a) supplemental jurisdiction over Gerasolo and Bleach cross-claims. On this basis, the district court ordered: "[T]he instant case will be administratively terminated." A31a.

The district court retained possession of the interpleaded fund, but solely as a custodian. It would be the decision of the New Jersey state court which would determine competing rights to the fund and how the district court must distribute it.

On November 16, 1994 the Gerasolos and Bleach filed Notice of Appeal to the United States Court of Appeals for the Third Circuit.

2. The Appeal to the Court of Appeals for the Third Circuit.

On appeal, the Gerasolos and Bleach argued: (1) the district court committed fundamental error by concluding its granting relief to NYLife, the stakeholder, marked the end of the federal interpleader action[1]; (2) under *Colorado River*

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[1] An interpleader action involves two-stages: "During the first the court determines the right of the party invoking the remedy to compel the

Water Conservation District v. United States, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) a district court may abstain from exercise of original federal jurisdiction "only in clear and exceptional circumstances, with the balances heavily weighted in favor of the exercise of jurisdiction." 460 U.S. at 16; and, (3) no "clear and exceptional circumstance" existed in this case.

TAG addressed the abstention issue by arguing: "the District Court need not have entertained any abstention doctrine analysis under the Federal Interpleader Statute, 28 U.S.C. § 1335, since [on May 19, 1994] an Interpleader judgment had been granted, and there was no longer a Federal claim with substance." TAG Brief, 5-6.

On August 1, 1995 the matter was argued.

On November 1, 1995 the Court of Appeals requested counsel return to re-argue the matter in light of *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S. Ct. 2137 (1995) wherein the Court held that the "exceptional circumstance" test for district court abstention established in *Colorado River* and *Moses H. Cone* was not applicable to actions seeking relief under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, thereby re-affirming the continued viability of *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942) (holding district courts have broad discretion to abstain from granting relief under the Federal Declaratory Judgment Act).

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claimants to litigate their claims to the stake in one proceeding. It is at this point that the court determines whether the prerequisites to . . . statutory interpleader have been met. . . ." 7 Wright-Miller-Kane ("W-M-K"), *Federal Practice and Procedure*, § 1714 pp. 581-82 (1986). The second stage of interpleader "involves the determination of the respective rights of the claimants to the stake. . . ." 7 W-M-K, *Federal Practice and Procedure*, § 1714 pp. 584-86 (1986).

On November 29, 1995 the matter was argued before a reconstituted panel of the Third Circuit.[2]

By decision[3] dated and filed December 21, 1995 the Third Circuit unanimously held the district court had erroneously found the granting of relief to NYLife, the interpleader plaintiff, had marked the end of the federal interpleader action:

> We . . . hold that the district court's conclusion that all federal claims had been dismissed by virtue of its May 19, 1994 order was in error, and that its October 26, 1994 decision to terminate the case in favor of TAG's pending state court action on this basis was as well erroneous.

A9a.

The Third Circuit then turned "to the legal principles that are implicated by that portion of TAG's motion which in effect requested that the interpleader action be dismissed so as to allow the parties to resolve their dispute over the [interpleaded fund] in the New Jersey state court." A9a-10a.

The Third Circuit recognized a conflict in circuit courts on the question of whether the district courts possess broad equitable discretion to decline jurisdiction over a statutory interpleader lawsuit in favor of a pending state court proceeding, citing *Boston Old Colony Ins. Co. v. Balbin*, 591 F.2d 1040 (5th Cir. 1979) as the contrary authority. A16a-17a.

However, the Third Circuit acknowledged:

> Our review has not produced nor have the parties suggested any cases which analyze the scope of a district court's discretion under 28 U.S.C. § 1335 (1993) to defer

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[2] As a consequence of the death of the Honorable William D. Hutchinson, a member of the original panel, the Honorable Anthony J. Scirica joined the panel.

[3] Decision of the Third Circuit is reproduced in the Appendix at A1a-27a.

> to state proceedings *in light of the Supreme Court decisions we have just discussed*. . . .

A17a (emphasis in original; the cases "just discussed" were *Colorado River*, *Moses H. Cone*, *Brillhart* and *Will*)[4].

This Court in *Wilton* had stated: "The plurality's suggestion in *Will*[5] that *Brillhart* might have application beyond the context of declaratory judgments was rejected by the Court in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). . . ." 115 S.Ct. at 2142.

Nonetheless, by majority decision (Justices Mansmann and Scirica) the Third Circuit held "in this case of first impression" actions brought in the district courts under the Federal Interpleader Act, 28 U.S.C. § 1335, are not protected by the "clear and exceptional circumstance" test for federal abstention established by *Colorado River* and re-affirmed by *Moses H. Cone*. Rather, guided by *Wilton*, where this Court determined that the *Brillhart* standard applies in declaratory judgment actions, the Third Circuit held: "[A] motion to dismiss a federal statutory interpleader action during the pendency of a parallel state court proceeding is addressed to the sound discretion of the district court." A2a-3a.

Justice Roth dissented, stating in part:

> I believe that the majority misinterprets the recent Supreme Court decision in [Wilton]. In my opinion, *Wilton* restricts the application of *Brillhart's* discretionary standard to actions brought under the Declaratory Judgment Act or similar statutes giving district courts express discretionary jurisdiction. . . .
>
> Beyond the declaratory judgment context and in the absence of express language granting jurisdictional discretion, . . . federal courts have a "virtually unflagging

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4 *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

5 *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

> obligation . . . to exercise the jurisdiction given them" by Congress. . . . Because this case clearly falls outside of the declaratory judgment context and because there is no statutory indication that there is a discretionary character to the second stage of an interpleader proceeding, *Brillhart's* broad discretionary standard should not be applied in this case.

A25a.

* * *

> I am disturbed by what I construe as the judicial destruction of a congressionally created federal remedy. In my opinion, allowing courts broad authority to decide when to abstain from exercising jurisdiction clearly granted by Congress is an inappropriate exercise of judicial authority.
>
> I would apply the more narrow *Colorado River* test here in order to adequately uphold federal jurisdiction and the purposes of the law. If Congress desires federal courts to have broad discretion to abstain from resolving disputes brought under the interpleader statute, then Congress, not this court, should make its desire clear by clarifying the language of the statute.

A27a.

On December 21, 1995 judgment was entered vacating the district court's October 26, 1994 order and remanding the case to the district court for further proceedings on TAG's motion "which requested that the court defer to the New Jersey state court proceeding as to the interpleaded claims and dismiss the cross-claims brought against it by Gerasolo and Bleach." A24a. On remand, the district court would apply the broad discretionary standard of *Brillhart*, not the "clear and extraordinary circumstance" standard of *Colorado River* and *Moses H. Cone*.

The Gerasolos and Bleach, and TAG, filed petitions for rehearing *in banc*.

On February 2, 1996 both petitions were denied. A32a, 33a.

REASONS FOR GRANTING WRIT

As stated in Supreme Court Rule 10, among the character of reasons considered by the Court in determining whether to exercise its discretion to review by writ of certiorari are when:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) . . . a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In accordance with the provisions of Rule 10 cited above, there are compelling reasons here for exercise by this Court of its discretion to review by writ of certiorari.

Firstly, the Third Circuit's majority decision below decides an important federal question, *i.e.*, the standard of discretion governing a district court's decision to abstain from exercise of original jurisdiction under the Federal Interpleader Act, 28 U.S.C. § 1335,[6] in a way that conflicts with the rule governing federal abstention established by this Court in *Colorado River* and *Moses H. Cone*.

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6 The Federal Interpleader Act, 28 U.S.C. § 1335, is reproduced in the Appendix at A34a.

Secondly, it represents a misapplication and unwarranted expansion of this Court's decision in *Wilton*, which re-affirmed *Brillhart*, a decision this Court recognized in *Moses H. Cone* had no application beyond the context of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.[7] 115 S.Ct. at 2142.

Thirdly, it is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit holding that under the Federal Interpleader Act: "[W]here jurisdiction clearly appears, Federal District Courts do not have the right to decline to exercise that jurisdiction in litigation involving no important question of the public policy of the state." *Maryland Casualty Co. v. Glassell-Taylor & Robinson*, 156 F.2d 519, 524 (5th Cir. 1946); *Boston Old Colony Ins. Co. v. Balbin*, 591 F.2d 1040 (5th Cir. 1979) (same).

Fourthly, it represents an undermining of the integrity of proceedings brought under the Federal Interpleader Act, 28 U.S.C. § 1335, a statutory scheme poles apart from the clearly discretionary nature of relief under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, considered in *Brillhart* and *Wilton*, thereby calling for the exercise by this Court of its supervisory power.

The Federal Interpleader Statute, 28 U.S.C. § 1335, represents an express grant of original subject matter jurisdiction. Congress declares: "The district courts *shall* have original jurisdiction of any civil action of interpleader . . . " where (1) the stake has a value of $500, or more, (2) at least two claimants are of adverse citizenship, and (3) the interpleader-plaintiff deposits the stake (cash or other property) into the registry of the court, "there to abide the judgment of the court." 28 U.S.C. § 1335(a)(1) and (2). (emphasis added).

By § 2361, Title 28 U.S.C.,[8] Congress declares a district court vested with subject matter jurisdiction under § 1335

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[7] The relevant provision of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, is reproduced in the Appendix at A36a.

[8] Title 28 U.S.C. § 2361 is reproduced in the Appendix at A35a.

"*shall* hear and determine the case" (emphasis added). To act on this mandate, Congress provides the district courts power to protect their interpleader jurisdiction by issuance of injunctions restraining all claimants "from instituting or prosecuting any proceeding in any State or United States court affecting the property . . . involved in the interpleader action," and to "make all appropriate orders to enforce its judgment." 28 U.S.C. § 2361.

To ensure all claimants to the fund are present in a single *federal* proceeding, Congress grants the district court power for nationwide service of process. 28 U.S.C. § 2361.

This Court has long mandated district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given to them," and "pendency of an action in a state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction." *McClellan v. Carland*, 217 U.S. 268, 282 (1910).

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), this Court emphasized "pendency of an action in a state court is no bar to proceedings concerning the same matter in the federal court," but on the facts before it, abstention was permitted on "exceptional circumstances" grounds to foster "wise judicial administration." The "exceptional circumstance" present in *Colorado River* was the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, by which the United States waived sovereign immunity to permit joinder of the United States in some state court suits for adjudication of water rights. However, this Court again emphasized circumstances permitting abstention in deference to parallel state court proceedings "are considerably more limited than the circumstances appropriate for [constitutional and comity based] abstention" and "*[o]nly the clearest of justifications will warrant dismissal* [*i.e.*, abstention]." *Id.* at 818-19 (emphasis in original).

In *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983), this Court re-affirmed *"Col-*

orado River abstention applies only in clear and exceptional cases, with the balance heavily weighted in favor of the exercise of jurisdiction."

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exists "exceptional" circumstances, the "clearest of justifications" that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. . . .

Id. at 25-26 (emphasis in original).

There are three constitutional or comity bases for abstention. First, a district court may postpone adjudication of a federal constitutional issue which may be mooted or presented in a different posture by state court determination of a state law issue. *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Second, a district court may abstain when exercise of federal subject matter jurisdiction would substantially interfere with a state regulatory scheme dealing with matters of significant importance to the state. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Third, a district court may abstain where exercise of subject matter jurisdiction would call upon the federal court to restrain state court proceedings in which the state has a significant law enforcement interest. *Younger v. Harris*, 401 U.S. 37 (1971).

None of the constitutional-comity bases for federal abstention are present here.

This Court has also recognized a narrow exception to the basic rule established by *Colorado River* and *Moses H. Cone*, where it has been able to identify in pertinent Congressional legislation a tempering of the policy against federal abstention. Such legislation was present in *Colorado River* where, deferring to Congressional policy declared in the McCarran Amendment, the Court approved dismissal of a federal action in favor of a parallel state court proceeding—"By far the most

important factor in our decision to approve the dismissal there [in *Colorado River*] was the 'clear federal policy . . . [o]f avoidance of piecemeal adjudication of water rights in a river system . . . as evidenced in the MCarran Amendment. . . .'" *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

In *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942) this Court had also found such tempering legislation in the Federal Declaratory Judgment Act. For this reason it was held district courts have broad discretion to determine whether they should entertain an action seeking relief under the Declaratory Judgment Act, even though such suit otherwise satisfied federal subject matter jurisdictional requirements. As stated by Justice Douglas (concurring): "The exercise of jurisdiction under the Federal Declaratory Judgment Act is certainly not compulsory; it is discretionary." *Id.* at 499.

In *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S.Ct. 2137 (1995), this Court revisited federal abstention under the Declaratory Judgment Act by addressing the following issue:

> [W]hether the discretionary standard set forth in [*Brillhart*] . . . , or the "exceptional circumstances" test developed in [*Colorado River* and *Moses H. Cone*], governs a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings, and under what standard of review a court of appeals should evaluate the district court's decision to do so.

Id. at 2139.

This Court found *Colorado River* and *Moses H. Cone* had not rendered *Brillhart* "an outmoded relic of another era." *Id.* at 2142. That was so, because:

> Distinct features of the Declaratory Judgment Act, we believe, justify a standard vesting district courts with greater discretion in declaratory judgment actions than

> that permitted under the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone*. No subsequent case, in our view, has called into question the application of the *Brillhart* standard to the *Brillhart* facts.
>
> Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." . . . The statutes' textual commitment to discretion, and the breath of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface. . . .

Id. at 2142 (emphasis in original).

Therefore, "[c]onsistent with the nonobligatory nature of the [declaratory] remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close." *Id.* at 2143.

In contradistinction to the Declaratory Judgment Act, the statutory scheme granting district courts interpleader jurisdiction evidences not the slightest intention such jurisdiction be "discretionary."

> [I]nstead of there being some "recognized public policy or defined principle" to the contrary, the [Federal Interpleader Act], which announces the public policy, does not leave it optional with the [district court] to pretermit such a case to State Court action, but on the contrary authorizes the Federal court to enjoin State Court proceedings in order to protect its jurisdiction.

Maryland Casualty Co. v. Glassell-Taylor & Robinson, 156 F.2d 519, 525 (5th Cir. 1946); *See also Boston Old Colony Ins. Co. v. Balbin*, 591 F.2d 1040 (5th Cir. 1979).

Among the factors counseling against *Colorado River/ Moses H. Cone* abstention in interpleader actions is the exercise by the district court of jurisdiction over property. *Colorado River*, 424 U.S. 800, 818 (1976).

All interpleader actions require as a jurisdictional predicate, deposit into the registry of the court property belonging to one or more of the claimants. As in the present case, it is very difficult to comprehend any justification for a federal district court entertaining an interpleader action, granting interpleader relief to the stakeholder, and then terminating the proceeding in mid-stream because one of the claimants sees fit to file a state court proceeding, thereby delegating to the subsequently commenced state court action the responsibility of telling the federal court what to do with the property. In an interpleader action, federal process is employed to take property from a citizen and to place it in the custody of the district court pending resolution of conflicting claims to it. Jurisdiction granted by the Federal Interpleader Act is a most appropriate candidate for the protection afforded by *Colorado River/Moses H. Cone* against federal abstention.

The Third Circuit's majority decision below sets the standard governing district court abstention in all interpleader actions henceforth commenced in the Third Circuit. It constitutes an unwarranted expansion of the *Brillhart* "discretionary" standard to govern abstention in federal interpleader actions. It not only compromises the integrity of the Federal Interpleader Act, but it also represents an invitation to district courts and courts of appeals in other circuits to expand *Brillhart* to other areas where the purpose of federal subject matter jurisdiction may be deemed to provide "equitable relief." This expansion of *Brillhart* is not justified by the *Wilton* decision; it most certainly cannot be justified by the statutory interpleader scheme established by Congress; it constitutes a substantial erosion of the "exceptional circumstance" test mandated by this Court in *Colorado River* and *Moses H. Cone* as the standard governing federal abstention; and, it repre-

sents an administration of the federal interpleader statutes contrary to that applicable in other circuits:

> We consider it important that the usefulness of the statutory remedy of interpleader . . . should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears, Federal District Courts do not have the right to decline to exercise that jurisdiction in litigation involving no important question of public policy of the State.

Maryland Casualty Co. v. Glassell-Taylor & Robinson, 156 F.2d 519, 524 (5th Cir. 1946); *See also Boston Old Colony Ins. Co. v. Balbin*, 591 F.2d 1040 (5th Cir. 1979).

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Dated: March 19, 1996

Respectfully submitted,

TOMPKINS, MCGUIRE & WACHENFELD
100 Mulberry Street
Gateway Four
Newark, NJ 07102
(201) 622-3000

CONNELL LOSQUADRO & ZERBO
17 State Street
New York, NY 10004
(212) 344-7400

Raymond A. Connell,

Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5725

NYLIFE DISTRIBUTORS, INC.,

Plaintiff,

—v.—

THE ADHERENCE GROUP, INC.; JOSEPH GERASOLO; PATRICK BLEACH; DENNIS SCHNELL; DONALD THOMAS; RICHARD HESSEN; JAMES LYONS; ELIZABETH GERASOLO,

Joseph Gerasolo, Elizabeth Gerasolo, and Patrick Bleach,

Appellants.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 94-cv-00637)

Argued November 29, 1995

Before: MANSMANN, SCIRICA and ROTH, *Circuit Judges.*

(Filed December 21, 1995)

William J. Salmond, Esquire
Alan J. Karcher, Esquire (ARGUED)
Karcher, Salmond, Ronan & Rainone
10 Parsonage Road
CN 2908
Edison, NJ 08818

Counsel for Appellee

Christopher J. Carey, Esquire
Tompkins, McGuire & Wachenfeld
100 Mulberry Street
Gateway Four
Newark, NJ 07102

Raymond A. Connell, Esquire (ARGUED)
Connell, Losquadro & Zerbo
17 State Street
New York, NY 10004

Counsel for Appellants

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

In this case of first impression, we consider whether the broad discretionary standard set forth in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), or the more narrow "exceptional circumstances" test enunciated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), applies to a district court's decision to dismiss an interpleader action commenced under 28 U.S.C. § 1335 (1993), in favor of parallel state court proceedings. Guided by the Supreme Court's recent decision in *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S. Ct. 2137 (1995), where the Court

determined that the *Brillhart* standard applies in declaratory judgment actions, we hold that a motion to dismiss a federal statutory interpleader action during the pendency of a parallel state court proceeding is addressed to the sound discretion of the district court.

Following the commencement of this section 1335 interpleader action, one of the defendant-claimants commenced a state court action. After the district court determined that the requirements of the statute had been met, but before the dispute to the stake had been adjudicated, this defendant filed a motion, essentially requesting that the district court defer to the state court action. Conflating the two-step nature of an interpleader action, the district court was of the belief that all federal claims had been eliminated and terminated the case. Instead, the court should have exercised its discretion to decide in which forum, federal or state, the unresolved dispute to the stake could be better determined. We will, therefore, vacate the district court's termination order and remand the case for the court to make this decision.

I.

Since its commencement, this case has taken a number of procedural twists and turns. We begin by reviewing those aspects of its history that are relevant to the issues before us.

On February 15, 1994, NYLife Distributors, Inc., the averred administrator of the "Mainstay Mutual Fund", filed a complaint in interpleader in the United States District Court for the District of New Jersey under 28 U.S.C. § 1335 (1993),[1]

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[1] Rule 22 of the Federal Rules of Civil Procedure is also a provision for interpleader. Fed. R. Civ. P. 22. While both statutory interpleader under 28 U.S.C. § 1335 (1993), and rule interpleader allow a person holding property to join in a single suit two or more persons asserting claims to that property, they are dissimilar in several ways; most notably, unlike statutory interpleader which confers subject matter jurisdiction on the federal courts, rule interpleader is purely procedural. Rule 22 interpleader is not implicated in, nor is it relevant, to this appeal.

against The Adherence Group, Inc. ("TAG")[2] and several TAG employees, including Joseph Gerasolo, the company's former President[3] and Patrick Bleach, its former Executive Vice President. NYLife is a New York corporation; TAG is organized under the laws of Delaware and has its principal place of business in New Jersey; Gerasolo is a citizen of New York; and Bleach is a citizen of New Jersey.

In its complaint, NYLife asserted that it was subject to conflicting demands from the defendants for monies it was holding in Mainstay Mutual Fund accounts opened for TAG employees in connection with TAG's executive compensation plan.[4] Claiming no interest in the money, NYLife further alleged that it intended to deposit the money with the court and requested that the defendants be required to interplead and settle among themselves their respective rights to the fund. On February 16, 1994, the individual defendants' total balance in the Mainstay Mutual Fund, which amounted to $215,489.50, was deposited in the court's Registry.

On March 7, 1994, Gerasolo and Bleach filed an answer to the interpleader complaint averring, *inter alia*, that TAG's claims were barred by certain settlement agreements, and brought a counterclaim against NYLife, alleging that NYLife's liquidation of their respective Mainstay Mutual Fund accounts was a breach of contractual and fiduciary duties. Additionally, Gerasolo and Bleach filed a cross-motion requesting, *inter alia*, that NYLife's interpleader action be

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2 The Adherence Group, Inc. refers to itself in its briefs as "TAG" and we adopt that designation.

3 Elizabeth Gerasolo, Joseph Gerasolo's wife, was also joined as a defendant in the interpleader action. For the sake of convenience, we will refer to Joseph and Elizabeth Gerasolo collectively as "Gerasolo".

4 More specifically, NYLife alleged that at about the same time it received a letter from TAG's attorney advising that "monies . . . had been improperly diverted from [TAG] to the [Mainstay Mutual Fund] accounts of the individual defendants . . ." and directing that "no funds be distributed from any of the accounts of the individual defendants until further notice[ ]", it received a request from one of the individual defendants for money from his Mainstay Mutual Fund account.

dismissed, except for the purpose of determining the damages they had allegedly sustained as a result of NYLife's actions.

On March 17, 1994, TAG filed an answer to NYLife's complaint, admitting that it and the individual defendants had subjected NYLife to conflicting claims for Mainstay Mutual Fund monies.

Shortly thereafter, on March 23, 1994, TAG and its sole shareholder, TAG/SCIB Services A.G., commenced an action in the Superior Court of New Jersey, Middlesex County, against Gerasolo and Bleach, alleging that they had wrongfully appropriated TAG assets, including the monies deposited in the Mainstay Mutual Fund, through fraud, embezzlement and conversion, and against the Moore Stephens Accounting Firm, TAG's auditor, for failure to uncover the fraud. The complaint was later amended on July 20, 1994, to join the law firm of Connell, Losquadro & Zerbo and unknown "John Doe" fictional defendants for allegedly conspiring with Gerasolo and Bleach to defraud TAG.

On May 19, 1994, the district court issued an order granting NYLife's motion for a judgment in interpleader in the amount of $215,489.50; dismissing NYLife from the case and from any future liability for the payment of the money into the court Registry; ordering that the defendants be enjoined from instituting any other action against NYLife or its affiliates based on NYLife's commencement of the interpleader action; awarding NYLife its attorneys' fees and costs; and dismissing the cross-motion for dismissal and counterclaim against NYLife that Gerasolo and Bleach had filed.

On June 1, 1994, Gerasolo and Bleach filed an amended answer to the interpleader complaint, adding cross-claims against TAG under New Jersey law for breach of contract, violations of the New Jersey Conscientious Employee Protection Act, 34 N.J. Stat. An. § 19-1 *et seq.* (1988), and malicious abuse of process.

Thereafter, the parties engaged in discovery.

On July 7, 1995, TAG filed a motion asking the district court to dismiss the cross-claims Gerasolo and Bleach had asserted against it and to transfer the interpleaded fund to the

Superior Court of New Jersey; in the alternative, TAG asked the court to retain the fund while the parties litigated their entitlement to the money in the action TAG had commenced in the New Jersey state court.

By order dated October 26, 1994, the district court granted TAG's motion. of the view that its May 19, 1994 order, which granted NYLife's motion for judgment in interpleader, denied Gerasolo's and Bleach's cross-motion for dismissal of the interpleader action and dismissed the counterclaim against NYLife, had "eliminat[ed]" all federal claims in this case[ ]", the court concluded that TAG was requesting that the court invoke its discretion under 28 U.S.C. § 1367(c) (1993) and decline to exercise supplemental jurisdiction over Gerasolo's and Bleach's state law cross-claims. Citing 28 U.S.C. § 1367(c)(3), which provides that a district court "may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed claims over which it has original jurisdiction[ ]", the court decided not to exercise its supplemental jurisdiction over the cross-claims based on its belief that no federal claims remained in the case. Accordingly, in its October 26, 1994 order, the court dismissed the crossclaims, retained jurisdiction over the interpleaded fund pending the outcome of the state court litigation (at which time the party who prevails in the state court may apply to the district court for a distribution of the fund) and administratively terminated the case.

Gerasolo and Bleach bring this appeal from the district Court's October 26, 1994 order, contending that due to the Court's misinterpretation of 28 U.S.C. § 1335, it in effect improperly "abstained" from this statutory interpleader action.[5]

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[5] The district court's October 26, 1994 order turned on its interpretation of the federal interpleader statute, 28 U.S.C. § 1335, which then formed the basis of the court's applicatio[illegible] of the supplemental jurisdiction statute, 28 U.S.C. § 1367(c)(3) (19[illegible]). Accordingly, our review is plenary. *See Air Courier Conference of Am./Int'l Comm. v. United States Postal Serv.*, 959 F.2d 1213, 1217, n.3 (3d Cir. 1992) (statutory construction or interpretation is a legal issue subject to plenary review).

II.

The federal interpleader statute, 28 U.S.C. § 1335 (1993), is a remedial device which enables a person holding property or money to compel two or more persons asserting mutually exclusive rights to the fund to join and litigate their respective claims in one action. 3A J. Moore & J. Lucas, Moore's Federal Practice § 22.02[1] (2d ed. 1994). The benefits of the device to both the stakeholder and the claimants are substantial. It relieves the stakeholder from determining at his peril the merits of competing claims and shields him from the prospect of multiple liability; it gives the claimant who ultimately prevails ready access to the disputed fund. *Id.*

Section 1335 grants *original* jurisdiction to the district courts over interpleader actions and sets forth certain requirements that must be met before the action may be maintained. For example, although the citizenship of the stakeholder is irrelevant for jurisdictional purposes, the statute calls for diversity of citizenship between two or more of the adverse claimants, requires that the amount in controversy, which is measured by the value of the stake, be $500, and compels the stakeholder to deposit the money or property at issue in the Court's Registry or, in the alternative, to give a bond payable to the clerk of courts in the appropriate amount.[6] 28 U.S.C.

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[6] Section 1335 provides:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more

§ 1335(a). Additionally, 28 U.S.C. § 2361 (1994) provides for nationwide service on all claimants in statutory interpleader actions and allows a district court in a section 1335 interpleader case to enjoin any state or federal proceedings affecting the stake; 28 U.S.C. § 1397 (1993) provides that section 1335 interpleader cases may be brought where one or more of the claimants reside.[7]

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of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C. § 1335 (1993).

[7] Section 2361 states:

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

28 U.S.C. § 2361 (1994).

(footnote continued)

An action commenced under section 1335 typically involves two steps: during the first, the district court determines whether the requirements of the statute have been met and whether the stakeholder may be relieved from liability; during the second, it actually adjudicates the defendants~ adverse claims to the interpleaded fund. *New York Ins. Co. v. Connecticut Dev. Auth.*, 700 F.2d 91, 95 (2d Cir. 1983); 7 C. Wright, A. Miller & M. Kane, 7 Federal Practice and Procedure § 1714 (2nd ed. 1986). The second stage, which proceeds like any other action, is ultimately resolved by the entry of a judgment in favor of the claimant who is lawfully entitled to the stake. *See Diamond Shamrock Oil & Gas Corp. v. Commissioner of Revenues*, 422 F.2d 532, 534 (8th Cir. 1970).

Here the district court completed the first step of interpleader on May 19, 1994, when it granted NYLife's motion for a judgment in interpleader and discharged NYLife from liability. The court did not, however, proceed to section 1335's second step—the unresolved dispute between the claimants for the interpleaded fund, which was, like the first, within the court's original jurisdiction. We thus hold that the district court's conclusion that all federal claims had been dismissed by virtue of its May 19, 1994 order was in error, and that its October 26, 1994 decision to terminate the case in favor of TAG's pending state court action on this basis was as well erroneous. It necessarily follows and we further conclude that the district court erred when it also dismissed Gerasolo's cross-claims under 28 U.S.C. § 1367(c)(3) (1993) on October 26, 1994, believing that all claims over which it had original jurisdiction had been eliminated from the case.

Our analysis, however, does not end here. We turn next to the legal principles that are implicated by that portion of TAG's motion which in effect requested that the interpleader

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Section 1397 states:

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

28 U.S.C. § 1397 (1993).

action be dismissed so as to allow the parties to resolve their dispute over the Mainstay Mutual Fund monies in the New Jersey state court.

III.

It is, of course, the general rule that the mere pendency of a similar action in a state court does not require, nor even permit, a federal court to refuse to hear or to stay an action that is properly within its jurisdiction, and that both state and federal actions should go forward until one of them results in a judgment that may be asserted as res judicata in the other, *McClellan v. Carland*, 217 U.S. 268, 281-82 (1910). Nonetheless, three doctrines of abstention have evolved which allow the district courts to decline to hear cases over which they have jurisdiction.[8] The parties are in agreement that these traditional abstention doctrines, which rest on considerations of proper constitutional adjudication or federal-state relations, do not apply in this case.

Over the years, an additional ground for dismissing or staying a federal action in favor of state court proceedings has developed; it is aimed at avoiding duplicative litigation and is premised on considerations which concern the efficient administration of judicial resources and the comprehensive disposition of cases. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). In our view, it is this additional category that is raised here.

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[8] The three traditional doctrines of abstention are: *Pullman* abstention, which is proper when a state court determination of a question of state law might moot or change a federal constitutional issue, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford* abstention, which applies when questions of state law in which the state has expressed a desire to establish a coherent policy on a matter of substantial public concern are raised, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Younger* abstention, which is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked to restrain state criminal proceedings. *Younger v Harris*, 401 U.S. 37 (1971).

A.

Some fifty years ago, in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), the Supreme Court held that the district courts may decline to hear lawsuits brought under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), in favor of pending state actions for reasons of judicial economy, even where they have jurisdiction. *Wilton v. Seven Falls Co.*, ___ U.S. ___ 115 S. Ct. 2137, 2140 (1995). In *Brillhart*, the Excess Insurance Company of America commenced a declaratory judgment in federal court to determine its rights under a reinsurance agreement with Central Mutual Insurance Company. Subsequently, Excess Insurance was joined in a Missouri state court garnishment proceeding that had been brought by Dewey Brillhart, the administrator of an estate, against Central Insurance to collect on a default judgment. Brillhart then moved to dismiss the declaratory judgment action, principally on the ground that the issues Excess insurance raised could be decided in the state garnishment proceeding. The district court granted Brillhart's motion to dismiss, apparently to avoid delay, without considering whether Excess Insurance's declaratory judgment claims could be resolved in the garnishment proceeding. The Court of Appeals for the Eighth Circuit reversed, holding that dismissal of the declaratory judgment action was an abuse of discretion, and remanded the case to the district court, directing it to proceed to the merits.

Reversing the court of appeals and remanding to the district court for another determination of the motion, the Supreme Court stated that "[a]lthough the [d]istrict [c]ourt had jurisdiction . . . , it was under no compulsion to exercise that jurisdiction[ ]", 316 U.S. at 494, and made clear that the district courts have the discretion to dismiss a declaratory judgment action when "it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Id.* at 495. The Court did not articulate all of the considerations which should guide a district court's

decision in this regard; it did provide, however, that the court "should ascertain whether the questions in controversy between the parties to the federal suit[ ] . . . can better be settled in the proceeding pending in state court[ ]", assess "the scope of the pending state proceeding and the nature of the defenses open there[ ]", and evaluate "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding, etc." *Id.*

Later, in the 1976 *Colorado River* case, 424 U.S. at 800, the Supreme Court revisited the propriety of a district Court's decision to dismiss a federal suit in favor of a concurrent state court proceeding for reasons of judicial economy and efficiency. There, the government filed a complaint pursuant to 28 U.S.C. § 1345 (1993), which grants the district courts original jurisdiction of all civil actions commenced by the United States, against some 1,000 non-federal water users for a declaration of the government's rights to water in certain Colorado rivers and their tributaries. Shortly after the federal suit was commenced, one of the defendants commenced a state proceeding for the purpose of adjudicating all government claims to the water, both state and federal. Several parties in the federal action then filed a motion to dismiss, asserting that the district court did not have jurisdiction. Without deciding the jurisdictional question, the district court abstained. On appeal, the Court of Appeals for the Tenth Circuit reversed, holding that the district court had jurisdiction and that abstention was inappropriate.

Reversing the court of appeals' judgment, the Supreme Court confirmed that federal courts may, in appropriate circumstances, defer to state court proceedings for reasons of wise judicial administration, but, without discussing *Brillhart*, announced a very different standard. 424 U.S. at 817. Where in *Brillhart* the Court warned district courts against "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation" and directed them to exercise discretion in deciding whether or not to proceed, 316 U.S. at 495, in *Colorado River* the Court referred to the "vir-

tually unflagging obligation of the federal courts to exercise the jurisdiction given them[ ]", and set forth an "exceptional circumstances" test of several factors that the district courts should utilize. 424 U.S. at 817-18. These factors are whether either court has assumed jurisdiction over property, the inconvenience of the federal forum, avoidance of piecemeal litigation, and the order in which the courts obtained jurisdiction. *Id.* at 818.

Two years after its decision in *Colorado River*, the Court decided *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), which concerned an action for an alleged violation of the federal securities laws commenced in federal court during the pendency of a related state court case. Relying on *Brillhart*, a plurality of the Court reversed the grant of a petition for a writ of mandamus ordering the district court to adjudicate the claim. According to the plurality, *Colorado River* had not "undermined[d] the conclusion of *Brillhart* that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Id.* at 664. Four Justices, however, joined Justice Brennan's dissent, which took issue with the plurality's reliance on *Brillhart* and its disregard for the *Colorado River* exceptional circumstances test. *Id.* at 668-77. Chief Justice Burger, although concurring in the judgment, agreed with the dissent that the *Colorado River* test was controlling. *Id.* at 668. In his dissenting opinion, Justice Brennan observed that while *Brillhart* concerned an action for a declaratory judgment where federal jurisdiction is "discretionary", *Calvert* involved a claim under the Securities Exchange Act of 1934 over which the federal courts have been given "non-discretionary", exclusive jurisdiction. *Id.* at 672.

Subsequently, in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court ruled that the *Colorado River* exceptional circumstances test, not the *Brillhart* discretionary approach, applies to a district court's decision to stay a diversity of citizenship action brought under section 4 of the United States Arbitration Act of 1925, 9 U.S.C. § 4, seeking an order compelling arbitration, *id.* at 14-19, and added two factors to the test—which forum's sub-

stantive law governs the merits of the litigation and the adequacy of the state forum to protect the parties' rights. *Id.* at 26. In doing so, the Court rejected the argument that *Calvert* had changed the law, noting that the majority of the Court in *Calvert* reaffirmed the *Colorado River* exceptional circumstances test, *id.* at 17, and that *Calvert* was distinguishable, since it involved the issuance of a writ of mandamus under 28 U.S.C. § 1651, where the movant must show a clear and indisputable right to the writ, not a typical appeal. *Id.* at 18.

Given these conflicting messages, not surprisingly circuit conflicts have arisen over the standard which governs a district court's decision to stay a declaratory judgment action in favor of parallel state proceedings; several courts, including our own, have applied the discretionary standard articulated in *Brillhart*, *e.g.*, *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778, n.12 (5th Cir. 1993) and *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213 (3d Cir. 1989), while other courts applied the relatively narrow exceptional circumstances test developed in *Colorado River*. *E.g.*, *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374, n.3 (8th Cir. 1994).

Quite recently, the Supreme Court resolved the conflict in *Wilton*, ___ U.S. ___, 115 S. Ct. at 2137, holding that the *Brillhart* discretionary standard governs a district court's decision to stay a federal declaratory judgment action during the pendency of parallel state court proceedings. There a dispute between the Hill Group and other parties over the ownership ar.d operation of oil and gas properties in Winkler County, Texas, was headed toward litigation. The Hill Group asked London Underwriters to provide it with coverage under several insurance policies in the event it was sued; London Underwriters refused. Following a three-week trial in Winkler County, a jury verdict in excess of $100 million was entered against the Hill Group. After the Hill Group gave London Underwriters notice of the verdict, the insurer filed an action under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988 ed., Supp. V), in federal court, seeking a declaration that the policies did not cover the Hill Group's liability. This action was voluntarily dismissed, but later refiled when the

Hill Group sued London Underwriters on the insurance policies in a state court. The Hill Group then moved to dismiss or, in the alternative, to stay London Underwriters' declaratory judgment action. Observing that the state lawsuit encompassed the coverage issues raised in the declaratory judgment action and concluding that a stay was warranted in order to avoid piecemeal litigation, the district court issued a stay; noting that " '[a] district court has broad discretion to grant (or decline to grant) declaratory judgment[ ]' ", the Court of Appeals for the Fifth Circuit affirmed. *Id.* at 2139-40.

The Supreme Court also affirmed. Its decision was premised on "[d]istinct features of the Declaratory Judgment Act," which in the Court's view, "justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone*." *Id.* at 2142. After noting the statute's "textual commitment to discretion" wherein a court "may declare the rights and other legal relations of any interested party seeking such a declaration," 28 U.S.C. § 2201(a), and the "breadth of leeway [it has] always understood [the Act] to suggest", the Court concluded that "[b]y the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district Court's quiver"; it created "an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 2143. Accordingly, the Court held that "[c]onsistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory "judgment before trial or after all arguments have drawn to a close." *Id.* (footnote omitted). The Court further held that the district courts are vested with discretion to make these determinations in the first instance and that their decisions should be reviewed under the abuse of discretion standard. *Id.* at 2144.

We turn now to the standard that governs a district court's decision to dismiss or stay an interpleader action commenced under 28 U.S.C. § 1335 (1993), due to the pendency of concurrent state court proceedings.

B.

At the outset, we observe that district courts have traditionally assumed that they possess broad equitable discretion to decline jurisdiction over a statutory interpleader lawsuit where in their view there is a pending state proceeding that obviates the need for the federal action. In *B. J. Van Ingen & Co. v. Connolly*, 225 F.2d 740 (3d Cir. 1955), for example, when we affirmed the district Court's dismissal of an interpleader action, we agreed that "in all the circumstances there was insufficient equity in the [plaintiff's] present complaint to make it incumbent upon a federal court to interfere by way of interpleader with what the state court [was] doing." *Id.* at 744. we also observed that the district court had "properly considered and given weight" to the plaintiff's position in deciding that "[the plaintiff] might equitably be left to have its responsibility and duty with references to the fund in question decided in the comprehensive New Jersey suit." *Id.* at 743. *See also American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) ("[I]t is well recognized that interpleader is an equitable remedy, and a federal court may abstain from deciding an interpleader action if another action could adequately redress the threat that the stakeholder might be held doubly liable."); *Koehring Co. v. Hyde Const. Co.*, 424 F.2d 1200, 1202 (7th Cir. 1970) ("[A] federal district court [has] the discretion to dismiss an action in statutory interpleader on grounds of equity and comity, when the interests of the stakeholder and all claimants will be adequately protected in a pending state court proceeding[ ]".); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 368 (4th Cir. 1968) ("The genesis of interpleader is equity, and we perceive no reason why it should be denied the remedial flexibility of a chancellor's decree. Thus, the district court can stay its proceedings [and] permit the parties to litigate ownership of the royalties in [state court] . . . ."); *Equitable Assur. Soc. v. Porter-Englehart*, 867 F.2d 79, 83 (1st Cir. 1989) (agreeing that the federal courts may in their discretion dismiss or stay statutory interpleader actions in favor of ongoing state proceedings); *Hickok v. Gulf Oil Co.*, 265 F.2d 798 (6th Cir. 1959) (same). *Contra*

Boston Old Colony Ins. Co. v. Balbin, 591 F.2d 1040 (5th Cir. 1979) (holding that a district court may not abstain from an interpleader action where important state public policy and "unusual circumstances" are not present).

Our review has not produced nor have the parties suggested any cases which analyze the scope of a district court's discretion under 28 U.S.C. § 1335 (1993) to defer to state proceedings *in light of the Supreme Court decisions we have discussed*. We believe our threshold inquiry is whether the exceptional circumstances test set forth in *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976), must invariably be applied whenever a district court with jurisdiction considers a request to defer to a state court action. In our view, it need not. We read the Supreme Court's decisions, beginning with *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), and ending with *Wilton v. Seven Falls Co.*, ____U.S. ___, 115 S. Ct. 2137 (1995), to instruct that the exceptional circumstances test is not universal and will yield in cases where the statute which grants a district court the authority to decide a matter "justif[ies] [as does the Declaratory Judgment Act] a standard vesting district courts with greater discretion . . . than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone*." *See Wilton*, ___ U.S. ___ , 115 S. Ct. at 2140.

Accordingly, we look to the interpleader statute to determine which standard—the discretionary approach taken in *Brillhart* or the exceptional circumstances test set forth in *Colorado River*—governs a district Court's decision to dismiss a federal interpleader action in favor of pending state proceedings. We initially observe that historically and under the statute, interpleader is a suit in equity. *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 199 (1934); 4 J. Pomeroy, A Treatise on Equity Jurisprudence § 1320 (5th ed. 1941).[9]

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[9] The first federal Interpleader Act was passed in 1917. Act of Feb. 22, 1917, ch. 113, 39 Stat. 929 (1917) (repealed 1926). The present provisions at 28 U.S.C. § 1335 (1993) and 28 U.S.C. § 2361 (1994) are bottomed on the Act as amended in 1936. 3A J. Moore & J. Lucas, Moore's Federal Practice, § 22.06 (2d ed. 1994). In the 1936 Act, the district courts were given original jurisdiction "[o]f suits in equity begun by

A federal interpleader court, therefore, by the nature of its jurisdiction proceeds with broad discretion. *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943). ("[A]n appeal to the equity jurisdiction conferred on [the] federal courts is an appeal to the sound discretion which guides the determinations of courts of equity."). *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

Hence, one of two related questions we f-ace is whether under section 1335, the district courts retain their traditional equitable discretion when deciding whether to hear a statutory interpleader case or defer to a state court; and the other is whether the district courts have a "virtually unflagging obligation" to exercise their section 1335 jurisdiction. In this regard, we find the Supreme Court's decision in *Weinberger v. Romeo-Barcelo*, 456 U.S. 305 (1982), instructive. There, the Court considered whether, under the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. IV), the district courts must enjoin violations of the Act or whether they retain the broad discretion that equity jurisdiction provides them in deciding issues of injunctive relief. To decide the issue, the Court looked to the overall structure and language, purpose and legislative history of the Act to determine whether Congress clearly intended to alter traditional equity practices, stating:

> '[T]he comprehensiveness of [the district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the Court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity,

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bills of interpleader or bills in the nature of bills of interpleader . . . ." Act of Jan. 20, 1936, ch. 13, 49 Stat. 1096 (1936) (current version at 28 U.S.C. § 1335(a)).

> securing complete justice, should not be yielded to light inferences or doubtful construction.'

Id. at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

The Court cautioned, however, that "[of] course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Id.* at 313.

Ultimately, the Court found nothing in the Clean Waters Act's language, structure, purpose or legislative history evidencing Congress' intent to deny the courts their traditional equitable discretion in deciding matters of equitable relief. *Id.* at 319. *Compare Bowles*, 321 U.S. at 321 (holding that the phrase "shall be granted" in section 925 of the Emergency Price Control Act of 1942, 50 U.S.C. § 901 *et seq.*, does not mean that injunctions for violations of the Act are mandatory; "if Congress had intended to make such a drastic departure from the tradition of equity practice, an unequivocal statement of its purpose would have been made.") *with TVA v. Hill*, 437 U.S. 153 (1978) (holding that the plain language and purpose of the Endangered Species Acts, 16 U.S.C. 1531 *et seq.*, contains a flat ban on the destruction of critical habitats, thereby foreclosing the exercise of the usual discretion possessed by a court of equity and requiring a district court to enjoin violations of the Act).

Against this backdrop, we turn to the text and structure, purpose and legislative history of section 1335 to determine the parameters of the district courts' discretion to decline jurisdiction and defer to state court proceedings for the sake of judicial administration and efficiency, looking specifically for any indication that Congress sought to limit a federal interpleader court's broad equitable discretion in such matters.

Starting with the statute's language and structure, we find that the text of section 1335, when considered with 28 U.S.C. § 2361 (1994), is inconclusive. Section 1335(b) of the interpleader statute provides that an action over which the district courts are granted original jurisdiction under section 1335(a)

"*may* be entertained", even where the of the conflicting claimants are adverse and independent of one another. 28 U.S.C. § 1335(b) (emphasis added). Although section 1335(b) is cast in discretionary terms, its permissive tone may relate solely to Congress' decision to abolish in the interpleader statute certain "historical limitations" that had been imposed on interpleader actions. *See* 3A J. Moore & J. Lucas, Moore's Federal Practice § 22.11 (2d ed. 1994) (The four historical requisites to a strict bill of interpleader were "same debt, common origin, disinterested shareholder and the absence of independent liability. . . ."). Section 2361, which authorizes the district courts to issue nationwide process and enjoin other actions affecting the stake, arguably suggests that a court may not decline to hear the case, stating that "[the] district court *shall* hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment." 28 U.S.C. § 2361 (emphasis added). We have not found any clues in other portions of section 1335[10] or section 2361 or in rel-

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[10] In support of their argument that the exceptional circumstances test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), should guide a district court's decision to dismiss a federal interpleader action in favor of pending state proceedings, Gerasolo and Bleach rely heavily on section 1335(a), which states in pertinent part that "[t]he district courts *shall* have original jurisdiction of any civil action of interpleader or in the nature of interpleader. . . ." 28 U.S.C. § 1335(a) (1993) (emphasis added). In our view, section 1335(a) represents Congress' decision to grant jurisdiction to the district courts in interpleader actions; it is not, as Gerasolo and Bleach urge, a directive on Congress' part that the district courts exercise that jurisdiction.

We note that Congress typically uses the language we see in 28 U.S.C. § 1335(a) when granting jurisdiction to the district courts. *See, e.g.*, 28 U.S.C. § 1331 (1993) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."); *Id.* § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between—(1) citizens of different States . . . . "); *Id.* § 1345 ("[T]he district courts shall have original jurisdiction of all civil actions . . . commenced by the United States. . . .").

evant legislative history to elucidate this language and its meaning. It does not seem likely, however, that at the same time Congress by way of section 2361 gave the district courts the considerable tool of nationwide process, retained their equitable power to order injunctive relief, and even granted them injunctive authority over state courts, thereby exempting statutory interpleader actions from the proscriptions of the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), it intended to narrow, if not eliminate, the district courts' discretion in deciding whether the issues raised in an interpleader action may be better resolved in a state court. We thus see section 2361 as a source of authority for the district courts, not as a command to the courts to exercise jurisdiction. We therefore resolve any ambiguities in sections 1335 and 2361 with regard to the district courts' capacity to decline jurisdiction in favor of that interpretation which preserves the courts' equitable discretion. *See Bowles*, 321 U.S. at 329.

As to the purpose of section 1335, it has long been recognized that the interpleader statute is remedial, aimed at assisting a party who fears the vexation of defending multiple claims to a fund or property under his control by providing him the opportunity to satisfy his obligation in a single proceeding. *See State Farm Fire & Casualty Co. v. Tashire*, 386 U S. 523, 533 (1967). Indeed, the trend over the years has been directed toward increasing the availability of interpleader and relaxing historical, technical restraints on the device. For example, the first interpleader statute, passed in 1917, limited the district courts' jurisdiction to strict bills of interpleader brought by an insurance company or a fraternal beneficiary society, Act of Feb. 22, 1917, ch. 113, 39 Stat. 929 (1917) (repealed 1926); by 1936, statutory interpleader was, as it still is, available to "any person, firm, corporation, association, or society. . . ." Act of Jan. 20, 1936, ch. 13, 49 Stat. 1096 (1936) (current version at 28 U.S.C. § 1335(a)). Moreover, since initially enacted, statutory interpleader has been greatly broadened to include within its purview disputes concerning a wide range of obligations and competing claims. *Id.* (current version at 28 U.S.C.

§ 1335(a),(b)).[11] *See* Zechariah Chaffee, Jr., *The Federal Interpleader Act of 1936: I. and II.*, 45 Yale L.J. 963, 1161 (1936). This expansion of the remedy leads us to conclude that by the interpleader statute, Congress was more interested in providing an opportunity to litigants to resolve disputes, than in creating a duty in the district courts to exercise the jurisdiction given them therein.

Finally, although the statute's scant legislative history does not shed light on the question we are deciding, it does not reveal any evidence of intent on Congress' part to limit or otherwise alter traditional equity practice in section 1335 cases or to make the interpleader remedy obligatory.

We thus hold that the discretionary standard enunciated in *Brillhart* governs a district court's decision to dismiss an action commenced under the interpleader statute during the pendency of parallel state court proceedings.

IV.

In *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S. Ct. 2137 (1995), the Court held that the decision to entertain a declaratory judgment action in view of a pending parallel state action is committed to the district courts in the first instance because "facts bearing on the usefulness of the . . . remedy, and the

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[11] A Senate Report summarized the modifications made to the statute by the Act of 1936 as follows:

> Bills in the nature of interpleader are included;
>
> The class of parties entitled to use of the remedy is broadened;
>
> The scope of interpleader is extended over other subjects than insurance;
>
> The titles or claims supporting the action are extended;
>
> The venue is made more convenient for claimants;
>
> A bond is permitted as an alternative deposit;
>
> Privity among claimants is abolished;
>
> Interpleader is allowed defensively in actions at law.

S. Rep. No. 558, 74th Cong., 1st Sess. 1 (1935).

fitness of the case for resolution, are particularly within their grasp." *Id.* at 2144. We believe that the same holds true in interpleader cases brought under 28 U.S.C. § 1335 (1993). Thus, this case must be remanded to the district court for it to exercise its sound discretion in deciding whether to dismiss this action in favor of the proceeding pending in the Superior Court of New Jersey.

On remand, the district court should determine, as a threshold matter, whether the state court action is indeed "parallel"; that is, whether it encompasses the competing claims to the Mainstay Mutual Fund monies that are raised here. Since the very basis for deference is the avoidance of needless duplicative litigation, the absence of a parallel state proceeding, as we have defined it in this context, would counsel against, if not proscribe, dismissal. Thereafter, in considering TAG's motion, the district court should bear in mind that neither the mere pendency of a parallel state court action nor the mere presence of state law issues in this case would support dismissal; the court must remain cognizant of the purpose of the interpleader statute, ultimately determining where the competing claims that expose the stakeholder to multiple lawsuits and liability "can better be settled." *See Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942). In this regard, the court should evaluate which forum will protect the stakeholder more effectively while providing the claimants with the more efficient, convenient, and expeditious vehicle to settle their dispute to the fund. We would also expect the district court to evaluate the conduct of the parties in litigating both the federal and state actions to ensure that procedural fencing, forum shopping or gamesmanship is not rewarded. We do not intend the considerations we have enunciated to be comprehensive, and leave it to the district court to consider any other factors it finds relevant.

Finally, as the Court noted in *Wilton*, "where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, insofar as it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the contro-

versy". *Id.* at 2143, n.2. Accordingly, the district court should also consider whether a stay of this action, rather than a dismissal, is appropriate, in the event it decides that the parties are to resolve the issues raised in this action in the state court.

V.

For the foregoing reasons, we will vacate the district court's October 26, 1994 order and remand the case to the district court for further proceedings on the Adherence Group's July 7, 1994 motion which requested that the court defer to the New Jersey state court proceeding as to the interpleaded claims and dismiss the cross-claims brought against it by Gerasolo and Bleach.

ROTH, *Circuit Judge*:

I agree with the majority's conclusion that the district court improperly terminated the interpleader proceedings, mistakenly believing that all federal claims had been dismissed. Unlike the majority, however, I am of the opinion that, after concluding that jurisdiction was proper under 28 U.S.C. § 1335 and dismissing the stakeholder from future liability, the district court was obligated to adjudicate the remainder of the interpleader proceeding. I therefore respectfully dissent.

The majority opinion concludes that the broad discretionary standard enunciated by the Supreme Court in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942), should be applied in this case. I disagree. Having completed the first stage of this interpleader proceeding, the district court was obligated to entertain the second stage of the proceeding, abstaining in favor of parallel state court proceedings only if exceptional circumstances required. Thus, I would hold that the appropriate standard to apply in this case is the "exceptional circumstances" established by the Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

I believe that the majority misinterprets the recent Supreme Court decision in *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S.Ct. 2137 (1995). In my opinion, *Wilton* restricts the application of *Brillhart*'s discretionary standard to actions brought under the Declaratory Judgment Act or similar statutes giving district courts express discretionary jurisdiction. at 2142. Beyond the declaratory judgment context and in the absence of express language granting jurisdictional discretion, however, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress. *Id.*; *Colorado River*, 424 U.S. at 817-18. Because this case clearly falls outside of the declaratory judgment context and because there is no statutory indication that there is a discretionary character to the second stage of an interpleader proceeding, *Brillhart*'s broad discretionary standard should not be applied in this case.

In *Wilton*, the Court acknowledged that the suggestion "that *Brillhart* might have application beyond the context of declaratory judgments was rejected by the Court in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)." *Wilton*, 115 S.Ct. at 2142. The Declaratory Judgment Act "has been understood to confer on federal courts *unique* and substantial discretion," *id.* (emphasis added), because it provides that a court "*may* declare the rights and other legal relations of any interested party seeking [a] declaration." 28 U.S.C. § 2201(a) (1988 ed., Supp. V) (emphasis added). It is clear from the language of the Act that Congress intended federal courts to have discretion when deciding whether to hear actions involving declaratory relief.

Section 1335, however, contains no language indicating that Congress intended courts to have such jurisdictional discretion when adjudicating interpleader proceedings. On the contrary, section 1335(a) provides that "[t]he district courts *shall* have original jurisdiction of any civil action of interpleader . . . ."[12] 28 U.S.C. § 1335(a). Section 1335 was

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[12] While I agree with the majority's characterization of section 1335(b), I believe that the word "shall" in section 1335(a) cannot be

intended to allow more parties to bring interpleader actions in federal courts by broadening the availability and the nature of relief. Congress therefore minimized diversity requirements, lowered the required amount in controversy, and provided for nationwide service of process. 28 U.S.C. §§ 1335(a) & 2361; *see* 3A MOORE'S FEDERAL PRACTICE ¶ 22.11 (1995). Nothing in prior Supreme Court decisions allows this court to carve out a discretionary niche based on the equitable nature of interpleader relief where Congress has clearly expressed its desire to provide a federal forum for diverse litigants. " '[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.' " *Colorado River*, 424 U.S. at 813-14 (quoting *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951)).

Abstention in favor of the state court proceeding is particularly disconcerting in this case because the federal proceeding was well underway. Indeed, as discussed in the majority opinion, the first stage of the proceeding had been entirely completed: the complaint was filed and answered, the court found that the jurisdictional requirements had been met and dismissed NYLife Distributors from the case and from any future liability. The only thing remaining for the court to do was to resolve the dispute between the claimants for the interpleaded fund.

The federal court clearly had priority over this case. *Moses H. Cone*, 460 U.S. at 21 ("[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions"). "It has been held . . . that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts[.]" *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-47 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964); *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936)). Thus, because the federal

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ignored merely because its use by Congress is "typical," as suggested by the majority opinion. Op. at 27, n.10.

proceedings were clearly "prior" to the state action, dismissing the federal claims seems all the more like an unjust abdication of the court's duty to exercise jurisdiction granted.

I dissent from the majority's opinion because it effectively reads diversity jurisdiction out of the interpleader statute whenever a similar action is pending in a state court. As with jurisdiction granted under the diversity statute, once a case is properly commenced in a federal court, the case should stay there unless there is a recognized reason for abstention or transfer. I am disturbed by what I construe as the judicial destruction of a congressionally created federal remedy. In my opinion, allowing courts broad authority to decide when to abstain from exercising jurisdiction clearly granted by Congress is an inappropriate exercise of judicial authority.

I would apply the more narrow *Colorado River* test here in order to adequately uphold federal jurisdiction and the purposes of the law.[13] If Congress desires federal courts to have broad discretion to abstain from resolving disputes brought under the interpleader statute, then Congress, not this court, should make its desire clear by clarifying the language of the statute.

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[13] I believe that this court may apply the exceptional circumstances test without remanding the issue to the district court given the adequacy of the record in this case. The Supreme Court has articulated a non-exclusive list of factors relevant to a determination of whether exceptional circumstances exist. That list includes: "the assumption by either court of jurisdiction over a res, the relative convenience of the fora, avoidance of piecemeal litigation, the order in which jurisdiction was obtained by the concurrent fora, whether and to what extent federal law provides the rules of decision on the merits, and the adequacy of state proceedings." *Wilton*, 115 S.Ct. at 2142. Balancing these factors "heavily weighted in favor of the exercise of jurisdiction," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983), I would hold that the district court improperly abstained and should have exercised its jurisdiction by completing the adjudication properly commenced in federal court.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 94-637 (MTB)
Filed October 26, 1994

NYLIFE DISTRIBUTORS, INC.,

Plaintiff,

—v.—

THE ADHERENCE GROUP, INC., JOSEPH GERASOLO, ELIZABETH GERASOLO, PATRICK BLEACH, DENNIS SCHNELL, DONALD THOMAS. RICHARD HESSEN, and JAMES LYONS,

Defendant.

ORDER

This matter having come before the court on defendant The Adherence Group's ("TAG's") motion to dismiss; and the court having reviewed the submissions of the parties pursuant to Fed.R.Civ.P. 78; and

it appearing that the instant case originally came before this court on February 11, 1994 upon plaintiff NYLife Distributors, Incorporated's ("NYLife's") order to show cause why it should not be granted judgment in interpleader as to the funds of various accounts over which a dispute had developed between TAG and the individual defendants; and

it appearing that by this court's order of May 19, 1994, plaintiff's motion for a judgment in interpleader was granted and the counterclaim of defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach ("the Gerasolo defendants") seeking, among other things, dismissal of NYLife's interpleader action, was itself dismissed; and

it appearing that TAG had instituted an action against the individual defendants in state court on or about March 7, 1994 alleging various causes of action based upon state law; and

it appearing that at the heart of the instant motion to dismiss is TAG's request that this court invoke its discretion under 28 U.S.C. § 1367(c) and decline to exercise supplemental jurisdiction over the state law crossclaims of the Gerasolo defendants filed with this court shortly before this court issued its May 19, 1994 order granting judgment in interpleader; and

it appearing that this court may decline to exercise supplemental jurisdiction in four enumerated circumstances in which it would otherwise be appropriate for a district court to exercise supplemental jurisdiction;[1] and

it appearing that this court may decline to exercise supplemental jurisdiction over the remaining state law crossclaims in that all federal claims have been dismissed, *see* 28 U.S.C. § 1367(c)(3); *Heller v. CACL Federal Credit Union*, 775 F.Supp. 839, 843 (E.D.Pa. 1991) ("While a federal court can exercise supplemental jurisdiction over state law claims

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[1] 28 U.S.C. § 1367(c) provides as follows:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

. . . the court should ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed");[2] and

it being the opinion of this court that a district court which opts to decline to invoke supplemental jurisdiction under § 1367(c) need not consider whether it may also decline to exercise jurisdiction over the crossclaims under various abstention doctrines;[3] and

it being the opinion of this court that a district court may retain jurisdiction over the funds already deposited into the court's registry pending the outcome of the litigation between the claimants in the state court; *see v. Marceaux*, 263 F.Supp. 892 (W.D. La. 1966) (district court retained jurisdiction over interpleaded funds pending resolution of state court litigation);

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[2] The May 19, 1994 order granted the motion for judgment in interpleader, and denied the cross-motion and dismissed the counterclaim of the Gerasolo defendant, thereby eliminating all federal claims in this case. Only the state law crossclaims and the interpleaded fund itself remain before this court. Such circumstances cry out for this court to decline to exercise supplemental jurisdiction under § 1367(c)(3), especially in light of the state court's refusal to dismiss the state court litigation involving the very same dispute.

[3] The Gerasolo defendants go to great lengths in an effort to demonstrate that this court should not dismiss this case under any abstention doctrine. In particular, the Gerasolo defendants argue that abstention is inappropriate under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (commonly referred to as "*Colorado River* abstention"). While the Gerasolo defendants do not explicitly say so, it appears that they are in effect arguing that even if this court could otherwise decline to exercise supplemental jurisdiction under § 1367(c)(3), the inappropriateness of *Colorado River* abstention here effectively strips this c ourt of any such discretion and mandates that this court exercise jurisdiction over the state law crossclaims.

Not surprisingly, the Gerasolo defendants supply no authority for this proposition as it fundamentally misconstrues the relationship between supplemental jurisdiction and abstention. Such doctrines exist independently of one another, and the mere fact that abstention may be unavailable in a given case does not preclude anotherwise sound invocation of the court's discretion to decline to exercise supplemental jurisdiction under § 1367(c)(3).

IT IS on this 26th day of October, 1994

ORDERED that defendant TAG's motion to dismiss the crossclaims before this court is hereby granted; and it is further

ORDERED that the court will retain jurisdiction over the interpleaded funds pending the outcome of the state court litigation between the claimants, at which time the prevailing party may apply to this court for an appropriate distribution of those funds; and it is further

ORDERED that the instant case will be administratively terminated.

MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5725
Filed February 2, 1996

NYLIFE DISTRIBUTORS, INC.,

—VS.—

THE ADHERENCE GROUP, INC.; et al.

Joseph Gerasolo, Elizabeth Gerasolo,
and Patrick Bleach,

Appellants.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS,
MCKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Roth would have granted rehearing.

BY THE COURT,

CAROL LOS MANSMANN
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5725
Filed February 2, 1996

NYLIFE DISTRIBUTORS, INC.,

—vs.—

THE ADHERENCE GROUP, INC.; et a.

Joseph Gerasolo, Elizabeth Gerasolo,
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SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
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SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS,
MCKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by The Adherence Group in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker and Roth would have granted rehearing.

BY THE COURT,

CAROL LOS MANSMANN
Circuit Judge

The Federal Interpleader Act, 28 U.S.C. § 1335

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title [28 U.S.C.S. § 1332], are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical but are adverse to and independent of one another.

Process and Procedures, 28 U.S.C. § 2361

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Relevant Provision of the Declaratory Judgment Act, 28 U.S.C. § 2201

§ 2201(a). Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an anti-dumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

No. 95-1515

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOSEPH GERASOLO, ELIZABETH GERASOLO and PATRICK BLEACH,

Petitioners,

vs.

THE ADHERENCE GROUP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LOUIS N. RAINONE
Counsel of Record
ALAN J. KARCHER
REBECCA ABBOTT DONINGTON
KARCHER • RAINONE, P.C.
Attorneys for Respondent
61-67 Main Street
Sayreville, New Jersey 08872
(908) 254-1900

8711
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Whether the District Court's decision to abstain in entertaining a second stage proceeding under the interpleader statute (28 U.S.C. § 1335 (1993)), having completed the first stage of the interpleader proceeding, in deference to a pending parallel state court proceeding is governed by the discretionary standard enunciated in *Brillhart*[1] or the "exceptional circumstances" standard set forth in *Colorado River.*[2]

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1. *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491 (1942).

2. *Colorado River Water Con. Dist. v. United States*, 424 U.S. 800 (1974).

LIST OF INTERESTED PARTIES

The Respondent is correctly identified in the caption. Pursuant to United States Supreme Court Rule 29(6), The Adherence Group, Inc.'s corporate stock is wholly owned by TAG/ICIB Services, A.G., a foreign corporation chartered and located in Zurich, Switzerland. Neither The Adherence Group, Inc. nor TAG/ICIB Services, A.G. possess non-whollyowned subsidiaries.

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APPENDIX

Appendix A — Order of the United States District Court for the District of New Jersey Filed May 19, 1994	1a

Respondent's request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit,[3] *Petition for Cert. filed*, 64 U.S.L.W. 368 (April 12, 1996) (No. 95-1515).

STATEMENT OF THE CASE

This case deals with a Verified Complaint filed in Interpleader by a disinterested stakeholder, NY Life Distributors, Inc. ("NY Life") which judgment in Interpleader was granted on May 19, 1994 by the United States District Court for the District of New Jersey.

Substantial assets of The Adherence Group, Inc. ("TAG") were placed by Petitioners Joseph Gerasolo, ("Gerasolo") and Patrick Bleach ("Bleach") into a non-qualified executive compensation plan opened with Mainstay, Inc. through NY Life.

Gerasolo as President of TAG and Bleach as Vice-President of TAG authorized that TAG's assets should be placed in the Mainstay Mutual Accounts as additional compensation without seeking the approval of the Board of Directors of TAG or authority of TAG's sole shareholders, its Swiss parent company, TAG/ICIB Services, A.G. ("TAG/ICIB").

In October of 1993, Gerasolo's employment with TAG was terminated. Shortly thereafter, Bleach resigned.

After Gerasolo and Bleach's employment with TAG ended, an internal audit of TAG's books and records were conducted by TAG and TAG/ICIB which revealed that Gerasolo and Bleach

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3. The Court of Appeals' opinion is unreported and reproduced in the Appendix of the Petition (Pet. App. 1a - 27a). All citations to the opinion will be to the opinion attached to the petition.

had implemented a compensation plan and had placed TAG's assets in the Mainstay Mutual Account without the knowledge of TAG, TAG's Chairman of the Board, nor its sole shareholder, TAG/ICIB. The audit also revealed other instances of the assets of TAG being embezzled and converted to the benefit of Gerasolo and Bleach.

TAG took steps to protect the monies held in the Mainstay Mutual Accounts and requested of NY Life that the accounts of Gerasolo and Bleach be frozen.

NY Life being a disinterested stakeholder and fearing competing claims to one fund, invoked the protection of the Federal Interpleader Act, 28 U.S.C. § 1335 (1993).

The settlement agreements (Pet. App. 3a-4a) were between Gerasolo, Bleach, and TAG/ICIB, not TAG, as all compensation to Gerasolo and Bleach was governed by an employment contract with TAG/ICIB.

On March 23, 1994, TAG and TAG/ICIB commenced an action in the Superior Court of New Jersey, Middlesex County, against Gerasolo, Elizabeth Gerasolo and Bleach, for the wrongful conversion and embezzlement of TAG's assets, through fraud, to their benefit, including the monies held in the Mainstay Mutual Fund. The Complaint also requests judgment for all of TAG's funds which were converted and then placed in the 1989 Mainstay Mutual Fund accounts opened jointly by Gerasolo and Elizabeth Gerasolo.

The Complaint includes a malpractice Count against the Moore Stephens Accounting Firm and was later amended to include a Count against the law firm of Connell, Losquadro & Zerbo and unknown John Doe(s).

A. Course of Proceeding and Disposition of the Case Below.

NY Life filed its Verified Complaint in Interpleader on February 15, 1994 in the United States District Court for the District of New Jersey. On February 16, 1994, an Order was signed requesting the defendants to show cause "why the plaintiff should not have judgment in interpleader requiring the defendants to interplead and settle between themselves their rights" to the Mainstay Mutual Funds.

The Petitioners Gerasolo, Elizabeth Gerasolo and Bleach answered the Interpleader Complaint and counterclaimed against NY Life. Gerasolo and Bleach filed a Cross-Motion seeking dismissal of NY Life's Interpleader action, reinvestment of the funds redeemed by NY Life, denial of NY Life's application for an Order enjoining all claims against it for damages sustained by Gerasolo and Bleach due to the liquidation, denial of NY Life's request for attorneys' fees and award of attorneys' fees and costs incurred by Gerasolo and Bleach in the Interpleader action from TAG pursuant to their severance agreements.

TAG filed an Answer to the Interpleader Complaint and a Brief in support of NY Life's Interpleader claim, in opposition to NY Life's claim for counsel fees and in opposition to Gerasolo and Bleach's request that TAG pay attorney fees in connection with the Interpleader action.

TAG, prior to Judgment in Interpleader, filed a Complaint in the Superior Court of New Jersey, Middlesex County, against Gerasolo, Elizabeth Gerasolo and Bleach, for the conversion of TAG's assets in excess of One Million Dollars ($1,000,000) including TAG's assets diverted into the Mainstay Mutual Funds which were the subject of NY Life's Verified Complaint in Interpleader. TAG obtained proper service of process and jurisdiction over all defendants.

The District Court, by Order dated May 19, 1994, granted plaintiffs' Motion in Interpleader (Resp. App., *infra* at 10a) and did not enjoin TAG "from pursuing its state law claims against the Gerasolo defendants." (Resp. App. 9a).

The District Court additionally dismissed NY Life from the action and future liability for the payment of said deposits into the Court Registry (Resp. App. 10a), ordered that all defendants to the Interpleader action be enjoined from instituting any other actions against NY Life or its affiliates based upon the Interpleader action (Resp. App. 10a), awarded NY Life attorneys' fees and costs (Resp. App. 10a), denied defendants Gerasolo, Elizabeth Gerasolo and Bleach's Cross-Motion (Resp. App. 10a), and dismissed Gerasolo, Elizabeth Gerasolo and Bleach's Counterclaims (Resp. App. 10a).

On June 14, 1994, after a Judgment in Interpleader was granted to NY Life and after TAG and TAG/ICIB filed the state court action. Gerasolo, Elizabeth Gerasolo and Bleach filed an Amended Answer to the Interpleader Complaint inserting a Crossclaim against TAG for attorney fees in connection with the Interpleader action, judgment against TAG for violation of the New Jersey Conscientious Employer Protection Act, N.J.S.A. 34:19-1, *et seq*. and malicious abuse of process in asserting a claim to Gerasolo and Elizabeth Gerasolo's 1989 Mainstay Mutual Account.

On July 8, 1994, TAG filed a Notice of Motion to Dismiss defendants Gerasolo and Bleach's crossclaims and transfer the Interpleader funds to the Superior Court of New Jersey or, in the alternative, retain jurisdiction over the Interpled funds while TAG pursued its state claims in state court.

On October 26, 1994, the District Court granted TAG's Motion to Dismiss the defendants Gerasolo and Bleach's

Crossclaims and ordered that the District Court retain jurisdiction over the Interpled funds pending the outcome of the state court litigation between the claimants at which time the prevailing party may apply to the court for an appropriate distribution of the funds (Pet. App. 31a). The District Court held that "all Federal claims had been dismissed and declined to exercise supplemental jurisdiction over the remaining State Law cost claims," pursuant to 28 U.S.C. § 1367(c) (Pet. App. 29a).

The Petitioners Gerasolos and Bleach filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

Argument before the United States Court of Appeals for the Third Circuit took place on August 1, 1995.

On October 30, 1995, the matter was relisted on the merits for Wednesday, November 29, 1995. Notice was also sent that the panel wished to discuss the applicability, if any, of *Wilton v. Seven Falls Company*.[4] On November 29, 1995, the matter was argued on the merits before a reconstituted panel of United States Court of Appeals for the Third Circuit.[5]

The Court of Appeals held "that a motion to dismiss a Federal Statutory Interpleader action during the pendency of a parallel State Court proceeding is addressed to the sound discretion of the District Court." (Pet. App. 3a).

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4. __ U.S. __, 115 S. Ct. 2137 (1995). There is no indication that the Court of Appeals' request for relisting on the merits was in light of *Wilton* but more appropriately, as a consequence of the death of the Honorable William D. Hutchinson, an original member of the Panel.

5. The Honorable Anthony J. Scirica joined the new panel.

The Court of Appeals rejected the District Court's assessment that once the first step of interpleader was completed on May 19, 1994, granting NY Life's Motion for Judgment in Interpleader and dismissing NY Life, that all federal claims had been dismissed, and accordingly, the District Court did not have discretion under 28 U.S.C. § 1367(c)(3) (1993) to dismiss all state law claims (Pet. App. 9a).

The Court of Appeals held that the "exceptional circumstances" test enunciated in *Colorado River* [6] was not universal and inapplicable based upon the Supreme Court's decisions in *Brillhart*[7] *Will*[8] and *Wilton*[9] to statutes vesting the District Courts with greater discretion (Pet. App. 17a). Interpleader is a suit in equity, and by its equitable nature, jurisdiction is conferred on the federal process within broad discretion (Pet. App. 17a-18a). There exists nothing in the language of the federal interpleader statute, 28 U.S.C. § 1335 (1993), nor in its legislative history that indicates Congress intended to alter traditional equity practice (Pet. App. 18a) or make the interpleader remedy obligatory (Pet. App. 22a).

The concurring opinion by Justice Roth would have applied the more narrow *Colorado River* test in this matter (Pet. App. 27a) as no statutory indication exists that the second stage of an interpleader proceeding is discretionary (Pet. App. 25a).

The case was remanded to the District Court for further

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6. *Colorado River Water Cons. Dist. v. United States.*, 424 U.S. 800 (1974).

7. *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

8. *Will v. Calvert Five Ins. Co.*, 437 U.S. 655 (1978).

9. *Wilton v. Seven Falls Co.*, __ U.S. __, 115 S. Ct. 2137 (1995).

proceedings on TAG's July 8, 1994 motion in light of the discretionary standard set forth in the Court of Appeals' Opinion.

All parties filed Petitions for Rehearing *in banc*. The petitions were denied.

REASONS FOR DENYING THE WRIT

I.

INTERPLEADER JURISDICTION UNDER THE FEDERAL INTERPLEADER STATUTE, HAS ALWAYS BEEN DISCRETIONARY.

Interpleader has, since its inception, been an equitable remedy.[10] The purpose of the federal interpleader statute, 28 U.S.C. § 1335, was to give the stakeholder protection and in no way changed the rights of the claimants or the equitable principles and procedures which govern throughout federal jurisdiction.[11]

The federal interpleader statute was enacted in response to the Supreme Court ruling in *New York Life Insurance Company v. Dunley*.[12] In *Dunley*, two different courts required the payment of the same life insurance policy, and the stakeholder could not join both claimants in one state court action. Due to the limitations of state service of process and the fact that adverse claimants to a single fund often reside in different states, state

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10. *Texas v. Florida*, 306 U.S. 398 (1939); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1933).

11. *Sanders*, 292 U.S. at 200.

12. 241 U.S. 518 (1916).

courts were incapable of providing full relief for a stakeholder faced with inconsistent claims.[13] Interpleader jurisdiction has always been considered discretionary, and interpleader should not be granted by equity if an adequate remedy exists at law.[14]

II.

THE OPINION OF THE THIRD CIRCUIT DOES NOT DIRECTLY CONFLICT WITH THE OPINION OF THE FIFTH CIRCUIT AND IS IN ACCORD WITH OTHER UNITED STATES COURTS OF APPEALS' DECISIONS.

The federal courts have consistently followed the view that the Interpleader statute does not compel the exercise of jurisdiction, depriving the courts of discretion traditionally exercised to deny equitable relief when there is an adequate remedy at law.[15] If a parallel state court action is pending wherein

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13. *See generally,* S. Rep. No. 660, 64th Cong., 1st Sess. 1 (1916).

14. *See Killin v. Ebbinghouse*, 110 U.S. 568,573 (1883) that "whenever a Court of Law is competent to take cognizance of a right and has power to proceed to judgment, which affords a plain adequate, and complete remedy without the aid of a Court of Equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury. *See* Chafee, *Modernizing Interpleader,* 30 Yale L.J. 814, 821 (1921).

15. *American Airlines, Inc. v. Block*, 905 F.2d 12 (2nd Cir. 1990); *Equitable Life Assur. Soc. v. Porter-Engelhardt*, 867 F.2d 79 (1st Cir. 1989); *Home Indemnity Co. v. Moore*, 499 F.2d 1202 (8th Cir. 1974); *Koehring Co. v. Hyde Construction Co.*, 424 F.2d 1200 (7th Cir. 1970), overruling *Railway Express Agency v. Jones*, 106 F.2d 341 (7th Cir. 1939); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364 (4th Cir. 1968); *Hickok v. Gulf Oil Corp.*, 265 F.2d 798 (6th Cir. 1959); *B.J. Van Ingem & Co. v. Connolly*, 225 F.2d 740 (3d Cir. 1955).

the liability of the stakeholder to all claimants can be determined, then the fear of multiple, vexatious and inconsistent liability is absent, and the need for the interpleader remedy is absent.[16]

A thorough review of the United States Court of Appeals for the Fifth Circuit's Decision from *Maryland Casualty Co. v. Glassell-Taylor and Robinson*, 156 F.2d 519 (5th Cir. 1946) to *Boston Old Colony Insurance Co. v. Baldin*, 591 F.2d 1040 (5th Cir. 1979) reveals an agreement with the United States Court of Appeals for the Third Circuit's opinion that district courts have discretionary power to stay proceedings in equity in deference to a parallel state court action.

Maryland Casualty Co., supra, at 524 recognized that the pendency of an action in state court is not a bar to the proceeding in federal court having jurisdiction. The Fifth Circuit Court of Appeals relied on the case of *Meredith v. Winter Haven*, 320 U.S. 228 (1942) which held that once diversity's jurisdiction was invoked, then, "[i]n the absence of some recognized public policy or defined principle guiding the existence of the jurisdiction conferred, which would in exceptional cases, warrant its non-exercise . . ." the federal courts have a duty to decide questions of state law.

In *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968), the United States Court of Appeals for the Fifth Circuit stated that "[i]nterpleader generally is a suit in equity which invokes equitable principles."

Next, in the case of *P.P.G. Industries v. Continental Oil Co.*, 478 F.2d 674-79 (5th Cir. 1970) the United States Court of

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16. *See* 3A Moore, *Federal Practice*, ¶22.16[1] at 3138 (2d Ed. 1967); 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1709, at 534 (2d Ed. 1986).

Appeals for the Fifth Circuit recognized that cases decided after *Brillhart* and *Meredith* have

> manifest a policy against dual litigation which applies with equal force to declaratory judgment actions and to ordinary equity suits, though not included in *Meredith's* list of exceptional circumstances, have given rise to a discretionary power in the Federal Courts to stay proceedings in equity suits in deference to a parallel State Court action.

Boston Old Colony Insurance Co. v. Baldin, 591 F.2d 1040 (5th Cir. 1979) is distinguishable from the present action and other suits wherein interpleader jurisdiction was denied in deference to a parallel state court action. First and foremost, the stakeholder was not disinterested. *Id.* at 1040. The Court of Appeals noted that the claimants were citizens of the same states, and the stakeholder not. Accordingly, jurisdiction of the court was founded upon the general diversity statute, 28 U.S.C. § 1332. *Id.* n. 5. Furthermore, the state court proceedings were inadequate to protect the stakeholder. *Id.* at 1045.

The Fifth Circuit Court of Appeals in *Boston Old Colony* held that "[o]nce jurisdiction is invoked, the general rule is that the District Court must proceed to decide the case . . ." *Id.* at 1043, relying upon *Meredith v. Winter Haven*, 320 U.S. 228, 236-37 (1943). *Meredith*, like *Boston Old Colony*, was an action whereby jurisdiction was premised under the general diversity statute, 28 U.S.C. § 1332, and not on minimal diversity in which the interpleader statute is premised, 28 U.S.C. § 1335(a)(1)(1993). The conferance of general diversity jurisdiction is to afford litigants an opportunity to assert their rights in federal, and not state court, and not to serve the convenience of the federal courts. *Meredith v. Winter Haven*, 320

U.S. 228, 234 (1943), 320 U.S. Accordingly, it was deemed a duty to exercise that jurisdiction once that jurisdiction was invoked. *Id.* Interpleader's minimal diversity was premised upon its equitable nature. In an ordinary case of partial co-citizenship, if federal jurisdiction is denied, the controversy can still be handled in state court. In Interpleader, jurisdiction over residents of different states is usually impossible in the state court, and accordingly, minimal diversity serves the purpose of the act that the federal court should settle all interpleader issues that cannot be handled by the state court.[17] Finally, in *Boston Old Colony Insurance Co.*, 591 F.2d at 1045, the stakeholder faced two lawsuits in the state court, and had difficulty joining all claimants in one action. The federal interpleader statute was enacted in response to just this situation.[18] Once all parties appear in the state court action in response to valid service of process, the necessity for the equitable federal remedy disappears.

It is clear that the United States Court of Appeals for the Fifth Circuit, in deciding *Boston Old Colony*, was applying the Supreme Court case law dealing with jurisdiction invoked under the general diversity statute and not the Supreme Court case law dealing with the district court's discretionary power to stay proceedings in equity suits in light of a parallel state court action in which all the parties appear.

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17. Chafee, *The Federal Interpleader Act of 1936*, 45 Yale Law Journal, 963, 974-975 (1936).

18. *See New York Life Ins. Co. v. Dunley*, 241 U.S. 518 (1916). *See* S. Rep. No. 660, 64th Cong. 1st Sess. 1 (1916).

III.

THE THIRD CIRCUIT OPINION VESTING THE DISTRICT COURTS WITH DISCRETION TO DISMISS SUITS BROUGHT UNDER THE FEDERAL INTERPLEADER STATUTE IN DEFERENCE TO A PARALLEL STATE COURT PROCEEDING IS A LOGICAL EXTENSION OF *WILTON V. SEVEN FALLS CO.* AND IN CONFORMANCE WITH SUPREME COURT DECISIONS FAVORING A POLICY AGAINST DUAL LITIGATION.

Courts of equity have always been vested with discretionary power.[19] In *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426,431 (1947), the Supreme Court stated "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." In *Abbott Laboratories v. Gardner*, 387 U.S. 136, the Supreme Court grouped together declaratory and injunctive relief and declared both remedies were discretionary.

The Supreme Court, in *Wilton*[20] held that the distinct features of the *Declaratory Judgment Act* "vested the District Court with greater discretion." The distinct features is that, since its inception, the *Declaratory Judgment Act* has been understood to confer substantial discretion, because of the statute's use of the word *may*, in 28 U.S.C. § 2201(a) (1988 ed., Supp. V.).

The federal interpleader statute, like the Declaratory Judgment Act, has always been known as an equitable remedy. The interpleader statute was adopted to provide a stakeholder

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19. *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943).

20. __ U.S. __, 115 S. Ct. 2137, 2142 (1995).

with relief when a state court proceeding was inadequate to join adverse claimants of different states. The reason for the grant of jurisdiction should determine its discretionary nature once invoked. Like declaratory judgment, and other equitable remedies, interpleader should not be granted when the parties have an adequate remedy at law in a parallel state court proceeding. Interpleader and declaratory judgment are remedies, and if the controversy can be adjudicated in a pending state court proceeding, federal declaratory relief is unwarranted[21] and so is interpleader relief.

The federal interpleader statute is to protect the disinterested stakeholder, and once this is complete, the statute does not provide the district courts with the ability to dismiss claimants' state court suits as long as the interpled funds are protected.[22]

Interpleader's purpose is to avoid piecemeal litigation, and by granting the district courts the discretion to dismiss an interpleader action in deference to a parallel state court proceeding, the legislative intent in invoking the federal interpleader statute, is served.

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21. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942).

22. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

IV.

COLORADO RIVER SUPPORTS THE PRINCIPLE THAT PIECEMEAL LITIGATION SHOULD BE AVOIDED, AND DISTRICT COURTS CAN ABSTAIN FROM THE EXERCISE OF JURISDICTION FOR REASONS OF JUDICIAL ECONOMY.

The Supreme Court has continually held that "a court having jurisdiction must exercise it, is not universally true . . . courts of equity and law . . . occasionally [sic] decline, in the interest of justice, to exercise jurisdiction . . .".[23]

The pendency of a parallel state court suit has been sanctioned by the Supreme Court in *Eccles* as an "unusual circumstance which might warrant withholding of equitable relief."[24]

Justice Brennan, in delivering the Court's Opinion in *Colorado River Water Con. Dist. v. United States*, 424 U.S. 800, 817 (1976) specifically points out that this case falls within none of the traditional abstention categories, but notes that there are principles unrelated to the abstention categories which govern concurrent jurisdiction by state and federal courts that take into consideration wise judicial administration and a regard for federal-state relations. Justice Brennan uses the language

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23. *Canada Malting Co. v. Paterson Steamships Ltd.*, 285 U.S. 413, 422-423 (1932); *see also Langnes v. Green*, 282 U.S. 531 (1931); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942); *Will v. Calvert*, 437 U.S. 655 (1978).

24. *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 434 (1947), the dissent by Justice Reed states that "unusual circumstances, not here present, such as other pending suits and then goes on to cite." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491.

"virtually unflagging obligation of the Federal Courts to exercise jurisdiction given them", and quotes the following Supreme Court authority, *England v. Medical Examiners*[25] and *McClellan v. Carland.*[26] *Id.* Next, the majority sanctioned *Brillhart*,[27] noting that the desirability of avoiding piecemeal litigation is to be used in "assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction." *Id.* at 818. The District Court's dismissal was justified because the policy underlying the McCarren Amendment, 66 Stat. 560, 43 U.S.C. § 666, was to avoid piecemeal adjudication of water rights. *Id.* at 819.

Granting the district courts with discretion to stay an interpleader action in deference to a parallel state court action serves the legislator intent in enacting the interpleader statute and does not conflict with the Supreme Court's holding in *Colorado River.*

The federal court's duty to exercise jurisdiction is determined by the reasons for the grant of the jurisdiction found in the legislative history. Interpleader jurisdiction was conferred on the federal courts to avoid piecemeal, inconsistent and vexatious litigation when full relief could not be rendered in a state court proceeding. *Colorado River* also favors the avoidance of piecemeal litigation and the possibility of inconsistent results in multiple litigation and allows the district court to consider wise judicial administration, and take into account which action will completely dispose of the litigation.

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25. 375 U.S. 411 (1963), here jurisdiction was conferred based upon a federal constitutional claim.

26. *McClellan v. Carland*, 217 U.S. 268 (1910), jurisdiction was conferred upon general diversity.

27. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

V.

THE EQUITABLE PRINCIPLES WHICH GOVERN THE DISTRICT COURT'S DISCRETION TO STAY A FEDERAL INTERPLEADER ACTION IN DEFERENCE TO A PENDING PARALLEL STATE COURT ACTION, APPLIES EQUALLY TO FIRST AND SECOND STAGE INTERPLEADER.

The federal interpleader action is a two-stage process. First, the stakeholder applies to the court for relief from double vexation, and in the second stage, the controversy is settled by the persons directly concerned.[28]

Interpleader can also protect the claimant by providing an equitable division of one fund.[29]

The district court possesses the same discretion to stay the second stage of a federal interpleader action in deference to a pending state court action.

Like first-stage interpleader, second-stage interpleader jurisdiction is only invoked for equitable reasons as in most instances, the substantive questions are legal. The interpleader forum should not be used to decide the controversy when a pending state court action will decide the controversy over the funds. A court of equity should not aid the court of law.[30]

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28. Chaffee, *Modernizing Interpleader*, 30 Yale L.J. 814, 816 (1921).

29. *State Farm Fire & Cas. Co. v. Tashir*, 386 U.S. 523 (1967). *See* 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1703, at 496 (2d Ed. 1986).

30. *Killian v. Ebbinghouse*, 110 U.S. 568, 573 (1883).

Once the funds are interpled, the stakeholder receives vindication when claimants are enjoined from seeking to enforce against the interpled fund except in the interpleader proceeding.[31] Interpleader cannot be used to control claimant's lawsuit as long as the stakeholder is protected.[32] The stakeholder who has no interest in the controversy cannot control the rights of the interested parties to choose the forum to establish their claims.[33] Interpleader was not intended as a "bill of peace, in a multiple party action."[34]

The District Court should naturally have the discretion to stay the controversy over the interpled funds in deference to a pending state court action that will settle the rights to the interpled funds. Any other conclusion would fly in the face of the federal policy of avoiding dual, vexation and piecemeal litigation, which is the fulcrum of the interpleader statute.

Once the stakeholder receives vindication, the interpleader purpose has been served and there is no policy in the legislative history of the Federal Interpleader Act mandating jurisdiction of the claimant's controversy in the federal district court.

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31. *State Farm Fire & Cas. Co. v. Tashir*, 386 U.S. 523 (1967).

32. *Id.* at 535.

33. *Id.* at 536.

34. *Id.*

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LOUIS N. RAINONE
Counsel of Record
ALAN J. KARCHER
REBECCA ABBOTT DONINGTON
KARCHER • RAINONE, P.C.
Attorneys for Respondent
61-67 Main Street
Sayreville, New Jersey 08872
(908) 254-1900

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 19, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 94-637 (MTB)

NYLIFE DISTRIBUTORS INC.,

Plaintiff,

v.

THE ADHERENCE GROUP, INC., JOSEPH GERASOLO, ELIZABETH GERASOLO, PATRICK BLEACH, DENNIS SCNELL, DONALD THOMAS, RICHARD HESSEN, and JAMES LYONS,

Defendants.

ORDER

This matter having come before the court on plaintiff's order to show cause why a judgment in interpleader should not be entered pursuant to 28 U.S.C. § 1335, and upon the cross-motion of defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach (hereinafter "the Gerasolo defendants");[1] and the court

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1. The Gerasolo defendants have brought a cross-motion seeking (1) dismissal of NYLife's interpleader action against defendants Joseph Gerasolo, Elizabeth Gerasolo, and Patrick Bleach save for the purpose of determining damages sustained by the defendants as a result of NYLife's allegedly

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having considered the submissions of the parties without oral argument pursuant to Fed.R.Civ.P. 78; and

it appearing that NYLife alleges that it makes this application in response to conflicting demands over the funds that it has placed into the court's registry; [2] and

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unauthorized redemption and liquidation of the 1989 and 1991 Gerasolo accounts and the 1991 Bleach accounts; (2) immediate reinvestment of the cash derived by NYLife from its allegedly unauthorized redemption and liquidation of the 1989 and 1991 Gerasolo accounts and the 1991 Bleach accounts; (3) denial of NYLife's application for an order enjoining all claims against it for losses sustained by the defendants as a consequence of NYLife's liquidation and redemption; (4) denial of NYLife's demand for attorneys' fees and costs; and (5) an award of attorneys' fees and costs for expenses incurred in defense of the interpleader action from both NYLife and The Adherence Group. *See Memorandum of Defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach in Opposition to Interpleader and in Support of Cross-Motion* (hereinafter "Memorandum of Gerasolo Defendants"). Although the Gerasolo defendants characterize all of these requests as components of their cross-motion, some are more accurately described as arguments in opposition to plaintiff's order to show cause. In particular, defendants' request for an order denying the interpleader action, denying permanent injunctive relief, and for a date upon which NYLife is to show cause why it should not be held responsible for defendants' costs and attorney's fees will be treated as opposition to plaintiff's interpleader action.

2. NYLife Distributors Incorporated administers the Mainstay Mutual Fund. The Adherence Group, ("TAG"), of which defendants Joseph Gerasolo and Patrick Bleach were officers, maintained a nonqualified executive compensation plan on behalf of certain employees, including the individual defendants. In accordance with that plan, TAG purchased shares of the Mainstay Mutual Fund on behalf of the individual defendants. As of February 14, 1994, the individual defendants' total balance in the Mainstay Mutual Fund amounted to $215,489.50. *See Verified Complaint,* ¶ 12.

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it appearing that there are multiple parties who have made a claim to the proceeds ;[3] and it appearing that NYLife has

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On January 27, 1994, John Mullenholz, the attorney for TAG, sent NYLife a letter "request[ing] that no funds be disbursed from any of the accounts to which The Adherence Group funds were diverted until you receive further notification from The Adherence Group." Mullenholz reported that TAG's request was in response to "an internal audit from which it discovered that significant funds were diverted to Mainstay Mutual Funds . . . in excess of $150,000." Mullenholz further stated that although TAG "would normally be required to obtain a court order . . . the officers of The Adherence Group are in the Far East and consequently, we cannot obtain a court order until their return." Mullenholz attached a list of the defendants' accounts with Mainstay which it desired to be frozen.

On the strength of this letter, NYLife proceeded to redeem and liquidate the accounts cited by Mullenholz by selling the stocks and bonds in the securities funds and emptying cash from the money market funds. Plaintiff then deposited a total of $215,489.50 in the Registry of the United States District Court for the District of New Jersey on February 16, 1994 and filed the instant motion. Insofar as plaintiff seeks judgment in interpleader, TAG does not oppose the application.

3. Title 28, section 1335 of the U.S. Code provides as follows:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of

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demonstrated a real and reasonable concern as a result of

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> such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if
>
> (2) the plaintiff has deposited such money or property, or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

A stakeholder may bring an action in interpleader when it fears that multiple claims may be brought against the funds that it holds. Thus, the remedy of interpleader is designed to avoid vexation and the fear of double liability. However, while "jurisdiction in interpleader is not dependent upon the merits of the claims of the parties interpleaded, and a plaintiff can maintain the action even though he believes that one of the claims is valid and the other, or others, without merit . . . he must have some real and reasonable fear of exposure to double liability or the vexation of conflicting claims to justify interpleader." *Bierman v. Marcus*, 246 F.2d 200, 202 (3d Cir. 1957); *Travelers Insurance Co. v. Johnson*, 579 F.Supp. 1457 (D.N.J. 1984). NYLife asserts that the instant case meets these requirements.

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conflicting and potentially vexatious claims and/or the threat of

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In response, the Gerasolo defendants assert that "NYLife has made no showing it has any good faith belief it is, or will be, subject to multiple vexation with respect to" the various accounts at issue and, further, that NYLife has failed to demonstrate any real or reasonable fear of double liability or vexation. *Memorandum of Gerasolo Defendants,* at 14. Defendants assert that the sole evidence that there would be any chance of double liability is the "uninformative" Mullenholz letter. *Id.* In addition, the Gerasolo defendants cite New York Banking Law § 518 for the proposition that, as an investment company, NYLife was under no obligation to any adverse claimant (i.e., TAG) until the claimant had obtained a court order restraining the investment company from distributing the funds. Finally, the Gerasolo defendants assert that the severance agreements between the individual defendants and TAG ICIB Services, A.G. are valid and enforceable agreements, thus rendering NYLife's fears unfounded. *Reply Memorandum in Support of Defendants Gerasolo and Bleach Cross-Motions,* at 6.

Even assuming that the defendants' assertions concerning the severance agreements are true, the Gerasolo defendants nonetheless overlook the fact that NYLife faces conflicting claims and the real possibility of vexation; indeed, the submissions of TAG vividly illustrate the fact that NYLife is confronted with genuinely conflicting claims. In addition, TAG has recently filed suit against the Gerasolo defendants in state court, lending further credence to NYLife's claim that it fears vexation or the threat of double liability.

Also, New York Banking Law § 518 — assuming that it is applicable — does not provide an impediment to NYLife's motion for interpleader. To reiterate, interpleader is appropriate where a stakeholder has a reasonable fear of double liability or vexation and eliminates the need for the stakeholder to determine the likely outcome of the underlying dispute.

The Gerasolo defendants may ultimately prevail in their legal dispute with TAG. Nonetheless, it is clear that, absent judgment in interpleader, NYLife faces a real and substantial risk of vexation or double liability. Therefore, NYLife has made the required showing under 28 U.S.C. § 1335.

double liability relating to the dispute concerning the 1989 and 1991 Gerasolo and the 1991 Bleach accounts ;[4] and

it being the opinion of this court that NYLife should be granted judgment in interpleader pursuant to 28 U.S.C. § 1335;[5] and

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4. In addition to their general objections to the interpleader action, the Gerasolo defendants argue vehemently that the "Gerasolo 1989 accounts had nothing whatsoever to do with TAG", and that "TAG does not now, and it never has, asserted any claim to Gerasolo 1989 accounts". *Memorandum of Gerasolo Defendants, at* 9. TAG does, however, assert a claim to those funds. TAG states that .[t]he monies held in the '1989 account' will be necessary to satisfy any judgment awarded to TAG, Inc. for Defendant Gerasolo's tortious conversion of assets and rightfully belongs in a constructive trust for the benefit of TAG, Inc." *Brief in Ooposition to Co-Defendant's Cross-Motion* (hereinafter "*TAG's Brief*"), at 6. Moreover, the Mullenholz letter requested NYLife to freeze "any of the accounts to which" funds allegedly embezzled from TAG had been diverted. Again, whether TAG will ultimately prevail in its claim over these funds is immaterial. Rather, NYLife need only show a real or reasonable fear of vexation or double liability. In addition, an inter-pleading plaintiff must deposit with the Court the highest amount claimed by the defendants." *Nationwide Mut. Ins. Co. v. Eckman,* 555 F.Supp. 775, 778 (D. Del. 1983). Given TAG's claims to these accounts, which TAG alleges were the recipients of embezzled TAG funds, this court cannot hold that NYLife's fear of double liability and particularly of vexation is unreasonable. Accordingly, NYLife's motion for judgment in interpleader is granted regarding the 1989 and 1991 accounts.

5. The Gerasolo defendants argue that even if judgment in interpleader is appropriate here, the defendants should not be enjoined from filing any actions against NYLife based upon NYLife's conduct in seeking relief via interpleader. The Gerasolo defendants base their argument on 28 U.S.C. § 1335, which allows a stakeholder to post a bond with the court in lieu of depositing the funds into the court's registry. Therefore, defendants reason, plaintiff's actions in redeeming and liquidating the various accounts were "unreasonable" in that NYLife could have instead posted a bond, and NYLife may thus be liable for any losses caused by the liquidation. Accordingly, the Gerasolo defendants assert that permanent injunctive relief should be denied.

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it being the opinion of this court that attorneys' fees should be awarded plaintiff ;[6] and

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The premise of defendants' theory, however, cannot be reconciled with the interpleader statute itself and is, not surprisingly, unsupported by any case law. Section 1335 allows a stakeholder to deposit the actual funds with the court's registry or to post a bond to cover that amount. The purpose of the bond requirement is to allow a plaintiff to meet one of the jurisdictional requirements of interpleader when it is not possible to place the actual money into the court's registry. *See* Wright & Miller, *Federal Practice and Procedure*, Civil § 1716. The statute does not obligate a stakeholder to choose one of these remedies over the other depending upon the interests of the underlying claimants, and defendants are unable to cite any authority for that proposition. The statute is designed as a remedy for the stakeholder, and there is not even the slightest suggestion that it gives rise to a cause of action on behalf of a claimant. *See* Wright & Miller, Civil § 1702. For this reason, on the court's own motion the Gerasolo defendants' counterclaim will be dismissed.

Under 28 U.S.C. § 2361, a district court "may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment." Thus, under the plain language of the statute, the court has discretion over whether to convert a temporary injunction barring state court or other federal court actions concerning the fund into a permanent injunction and thereby effectuate the underlying purpose of the interpleader statute. *See, e.g., Shell Pipe Line Corp. v. West Texas Marketing Corp.*, 540 F.Supp. 1155, 1160; Wright & Miller, Civil § 1717. *But see, Algemene Bank v. Soysen Tarim Urunleri Dis Ticaret*, 748 F.Supp. 177, 180 (S.D.N.Y. 1990) ("[Plaintiff] was fully justified in invoking interpleader. Having done so, and having complied with the statutory requirements, "[plaintiff] is now entitled to a discharge and protection against further liability, pursuant to 28 U.S.C. § 2361.") Given the Gerasolo defendants' inability to muster any authority to suggest that NYLife may be held liable based on its placement of the funds with the court as opposed to posting a bond, this court will grant plaintiff's motion for permanent injunctive relief, thereby discharging plaintiff.

6. It is well settled that the award of attorney's fees upon bringing an

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it being the opinion of the court that the request by the

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interpleader action is discretionary. *See* Wright & Miller, Civil § 1719; *Prudential Ins. Co. of America v. Cooper,* 666 F.Supp. 190, 193 (D.Id. 1987). "Typically [attorney's costs and fees] are available only when the party initiating the interpleader is acting as a mere stakeholder, which means that he has admitted liability, has deposited the fund in the court, and has asked to be relieved of further liability." Wright & Miller, Civil § 1719. Upon first blush, then, NYLife appears entitled to an award of attorney's fees.

Both TAG and the Gerasolo defendants suggest, however, that a well-recognized exception to this rule applies to this case. Both argue that a stakeholder may not liberally transfer costs and attorney's fees onto their customers when these costs are incurred in the ordinary course of business. *See Travelers Indemnity Co. v. Israel,* 354 F.2d 488, 490 (2d Cir. 1965). TAG characterizes NYLife's actions as "the type of routine and matter-of-course activity an investment firm such as NYLife should expect to undertake." *TAG's Brief,* at 18. Further, TAG asserts that the simplicity of filing an interpleader action is a factor arguing against awarding attorney's fees.

While it may be true that NYLife faces conflicting claims to investment funds on a regular basis, it most surely does not deal with accusations of employee embezzlement and claims to pension funds for compensation as a "matter-of-course". NYLife was faced with an unusual and urgent set of circumstances and reacted accordingly. Moreover, neither defendant cites any authority for the proposition that attorney's fees are to be denied to interpleading investment firms, let alone those grappling with claims of embezzlement. Finally, the multiple submissions related to NYLife's motion belie the claim that this has been a relatively simple interpleader action.

Accordingly, this court will award reasonable costs and attorney's fees to NYLife in the amount of $5,586.50 as documented in plaintiff's Affidavit of Legal Services and Disbursements. The request by the Gerasolo defendants that this court should fix a date upon which NYLife should show cause why it should not be responsible for the costs and attorney's fees of the Gerasolo defendants is therefore denied.

Appendix A

Gerasolo defendants that TAG be directed to show cause on a date fixed by the court why TAG should not be responsible for the costs and attorney's fees incurred by the Gerasolo defendants in defending this interpleader action must await a determination on the merits of the underlying dispute between TAG and the Gerasolo defendants; and it being the opinion of this court that this court will not prohibit defendant TAG from pursuing its state law claims against the Gerasolo defendants in its separately filed state action nor will it grant TAG leave to do so;[7] and

IT IS on this 19th day of May, 1994,

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7. Defendant TAG requests that this court grant it leave to pursue its claims against the Gerasolo defendants in its previously filed state court action. *TAG's Brief*, at 13. The Gerasolo defendants respond to this request by asserting that this court has supplemental jurisdiction over any cross-claims between the co-defendants and should therefore deny TAG's request. These arguments overlook some very fundamental problems, however. First, this court has been requested by TAG to take action without benefit of a properly filed motion. Second, even if this court would have supplemental jurisdiction over any cross-claims between the codefendants, no cross-claims have been filed with this court relating to the underlying dispute or anything else. Accordingly, this court will neither grant nor deny TAG's request. Finally, it should be noted that "Rule [13(g)] countenances the assertion of cross-claims 'arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.' [citations omitted]. Such cross-claims . . . may be litigated in the course of the interpleader proceeding despite the absence of diversity of citizenship between the particular parties; subject matter jurisdiction is ancillary to that of the interpleader action." James W. Moore, *Moore's Federal Practice*, vol. 3A, § 22.15, p. 22-154; *see also Total Petroleum. Inc. v. Preston Oil Co.*, 1992 WL 71358 (W.D. Mich.). Nevertheless, TAG has elected to pursue its claims in the state court which has jurisdiction over the state law claims, and need not seek permission from this court to pursue such claims in that forum.

Appendix A

ORDERED that plaintiff's motion for a judgment in interpleader in the amount of $215,489.50 is hereby granted; and it is further

ORDERED that plaintiff is hereby dismissed from this action and discharged from any and all further liability for the payment of said deposit into this court's registry; and it is further

ORDERED that defendants The Adherence Group, Inc., Joseph Gerasolo, Elizabeth Gerasolo, Patrick Bleach, Dennis Schnell, Donald Thomas, Richard Hessen, and James Lyons are hereby restrained and enjoined from instituting any other action in this or any other jurisdiction against NYLife Distributors, Inc. or its affiliates based upon NYLife's actions in interpleader action; and it is further bringing this interpleader action; and it is further

ORDERED that plaintiff's motion for costs and attorney's fees in the amount of $5,586.50 is hereby granted; and it is further

ORDERED that defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach's cross-motion is denied; and it is further

ORDERED that on the court's own motion, the Gerasolo defendants' counterclaim, which seeks dismissal of the interpleader action and damages as a result of plaintiff's "improper redemption and liquidation" of defendants' accounts for purposes of depositing those monies in court, will be dismissed.

s/ Maryanne Trump Barry

MARYANNE TRUMP BARRY
U.S.D.J.